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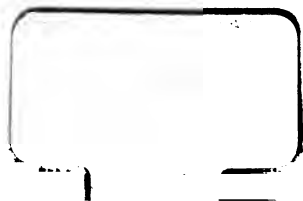
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THE LAW OF ARREST

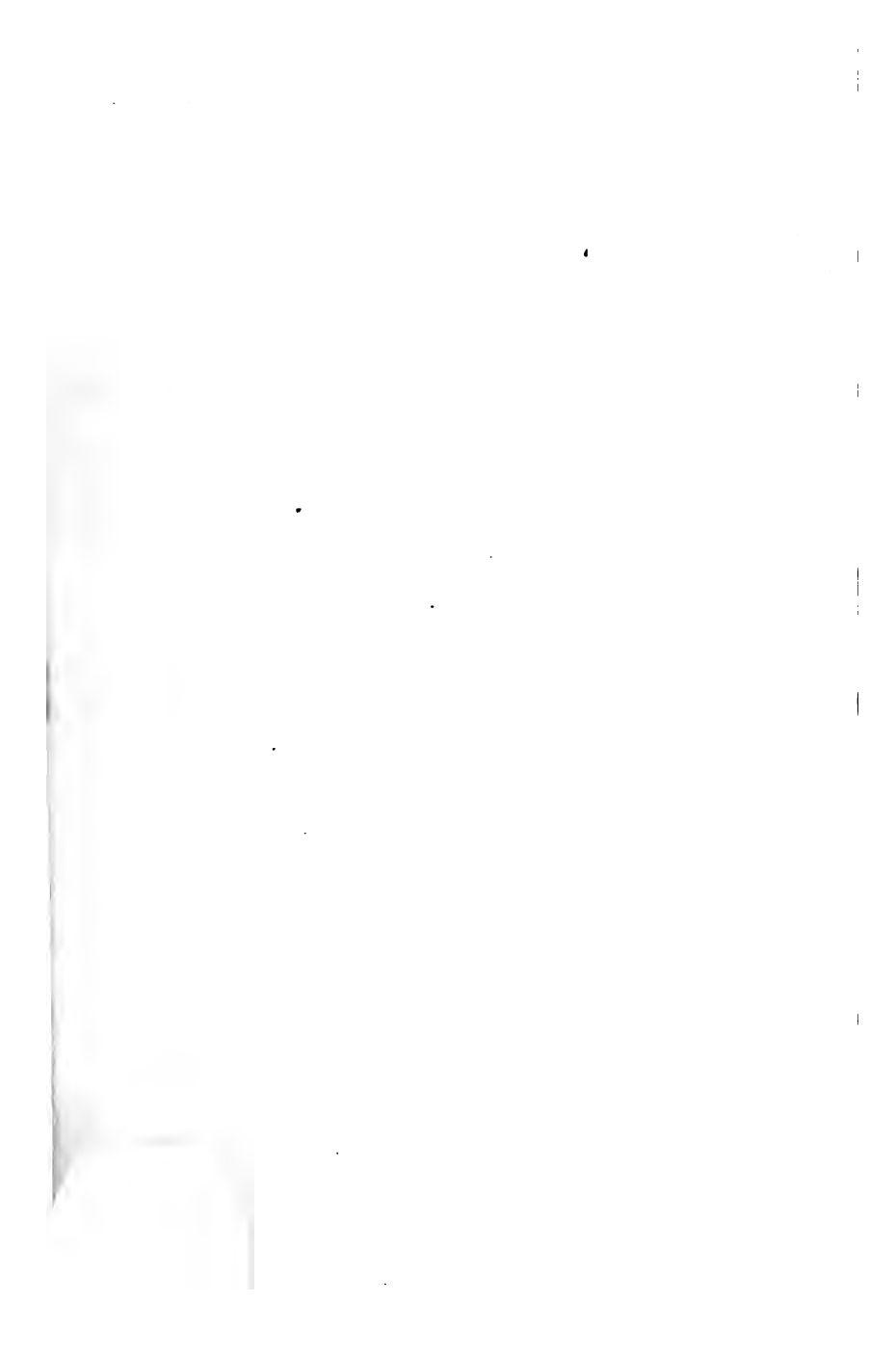
VOORHEES



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PT. 2



THE LAW OF ARREST



THE
LAW OF ARREST
IN
CIVIL AND CRIMINAL ACTIONS

BY
HARVEY CORTLANDT VOORHEES
OF THE BOSTON BAR ✓

SECOND EDITION

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1915

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PREFACE TO THE SECOND EDITION

TEN years have elapsed since this handbook on personal liberty, and the restriction thereof by due process of law, made its first appearance. During that period it has attained a position as a *vade mecum* on the law of arrest, and is now in common use in police departments, and law offices, wherever English and American law forms the basis of jurisprudence.

During this period the peculiar needs of peace officers in the matter of arresting offenders have been brought to the author's attention in many ways, principal among which are suggestions from such officers themselves. An effort has accordingly been made to give careful treatment of the many details of this subject so that the book may be of highest value to officers making arrests.

It might be considered that the statutes, of the particular jurisdiction in which an arrest is made, contain sufficient law on this subject to enable an officer to act lawfully; but, as a

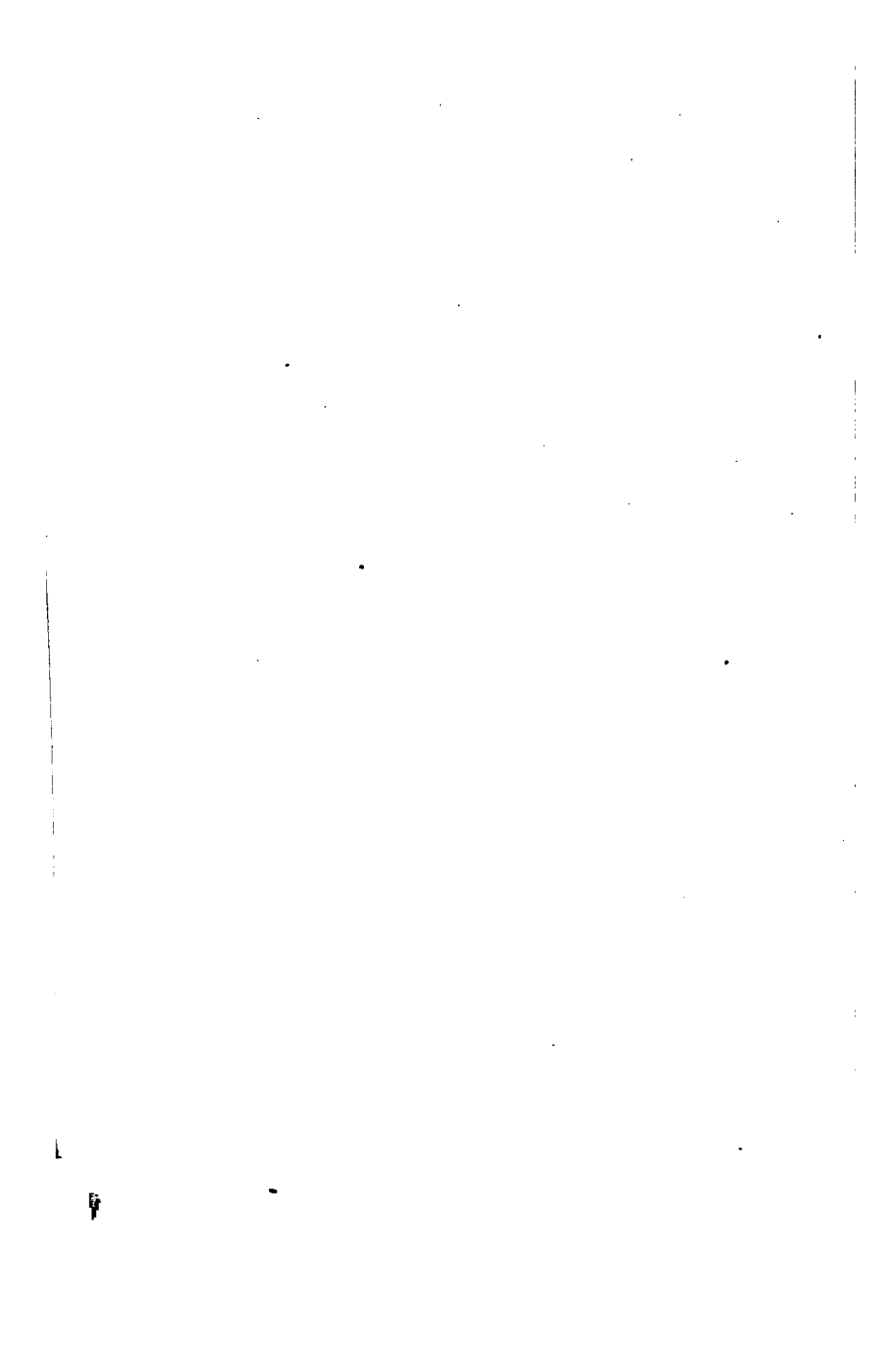
matter of fact, this is not true. Of course, the statutes of the jurisdiction in which an arrest is made must be exactly followed, but they contain only a portion of the law which must guide an officer to lawful arrest in most cases, and the officer who acts wisely and legally in close cases, keeping strictly within the law without failing to act, will win the commendations of his superiors. It is especially in these close cases that we aim to assist. The statutes, for instance, may detail the right or duty of making an arrest for breach of the peace, but they probably never attempt to state what is a breach of the peace. So of breaking doors; the use of stratagem when effecting an arrest; the effect of illegal arrest or seizure; illegality in the use of force and handcuffs; confining the prisoner, and general treatment of the prisoner.

That the subject of arrest is not thoroughly understood even by those high in authority in police departments is evidenced by the many cases successfully brought for illegal acts in making arrests. In this, the second edition, is presented the development of later law, which from its importance has made advisable the rewriting and rearranging of the book generally; and for convenience in referring to the

cases themselves, additions have been made of citations to the Reporter System, and to the Lawyers' edition of the United States Reports. To further enhance the usefulness of the work a collection of annotated criminal forms pertaining to the subject has been added.

THE AUTHOR.

**BOSTON, MASS.,
February 1st, 1915.**



PREFACE TO THE FIRST EDITION

IN the preparation of this treatise the writer has endeavored to produce a work so exhaustive that the profession might feel justified in pronouncing it a standard authority on the subject with which it deals. At the same time it has been the effort to produce a work of such simple style that it would be intelligible to those not versed in legal lore, and that the many officers of the law who are called upon to invade the sacred right of personal liberty might do so with a full understanding of the rights of the accused, as well as their own rights.

On the points of law where the cases are not in harmony, and cannot be reconciled, as, for example, whether, at common law, a seal was essential to the validity of a warrant, a careful examination of the decisions has been made, and what has appeared to be the better reasoning and weight of authority has been presented.

The citations, covering the best decisions of both English and American courts, have been selected with view of making the work exceedingly useful as a general treatise on this important subject in the different States.

HARVEY CORTLANDT VOORHEES.

BOSTON, MASS.,
May 1, 1904.

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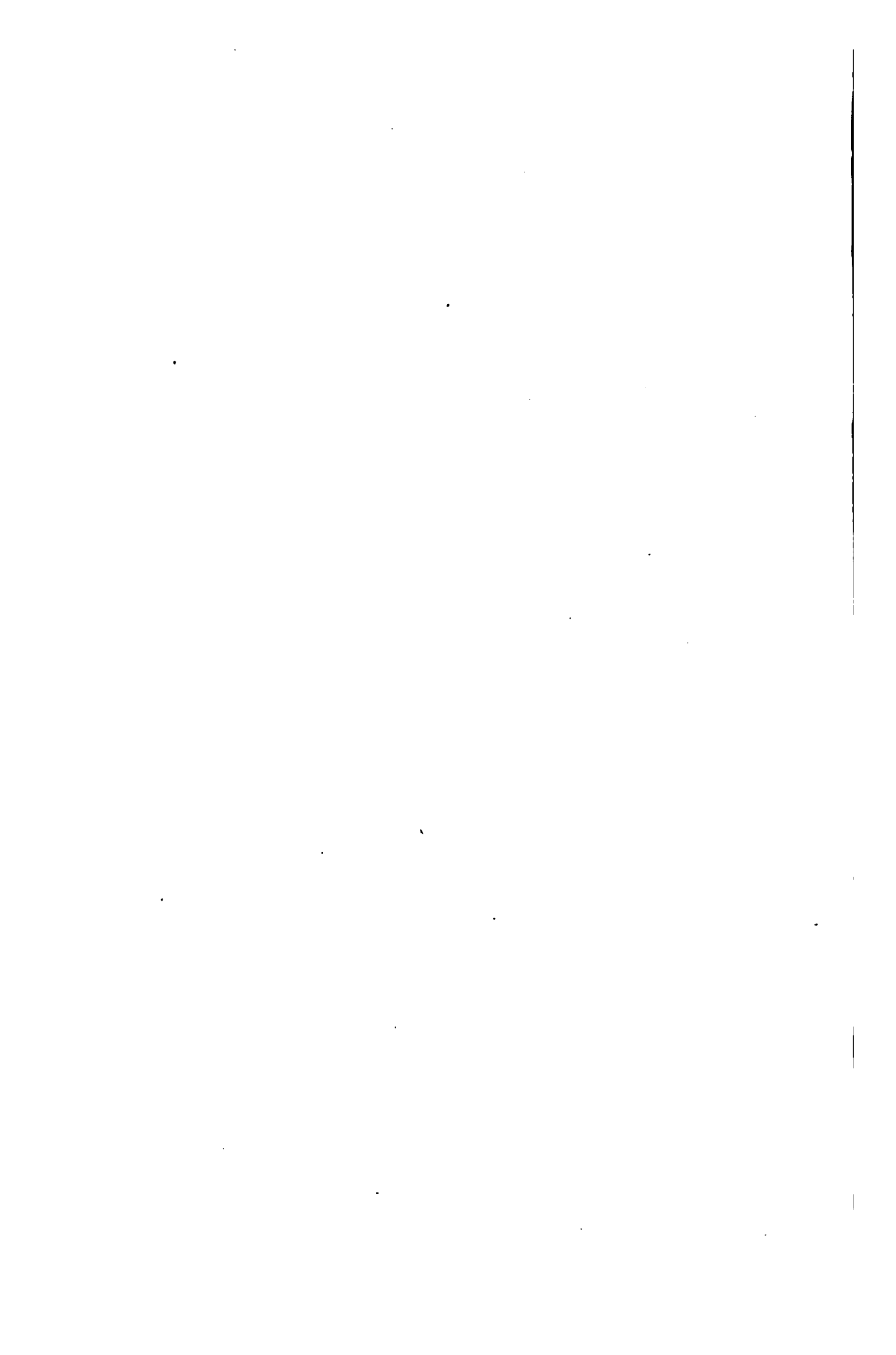
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STANFORD LIBRARY

THE LAW OF ARREST

CHAPTER I

THE RIGHT OF PERSONAL LIBERTY

§ 1. **Definition.** — The right of personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law.¹

§ 2. **A Natural Right.** — This right is a natural one such as has ever been the birthright of every freeman, even in those ages before civilization had exercised its softening influence upon man's passions, and is now guarded with jealous care by that inexorable mistress, "the law of the land."²

¹ 1 Bl. Com. 135; *Butchers' Union, etc. Co. v. Crescent City, etc. Co.*, 111 U. S. 746, 28 L. ed. 585; *In Matter of Jacobs*, 98 N. Y. 98.

² *The Trustees of Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

§ 3. **Secured by Magna Charta.** — It is a right which was stoutly maintained by our English ancestors, and is one of the rights which they secured to themselves by the famous Magna Charta (Great Charter), which was given to the barons of England by King John, in 1215, under persuasion of the sword.¹

The right of personal liberty as reduced to written evidence by this great charter was not a new law, but was rather a correction of abuses of the right, which then endangered the liberty of the English people. The language of the Magna Charta is, that no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land.

§ 4. **Strengthened by "Petition of Right" and "Habeas Corpus Act."** — By the Petition of Right in 1628, it was further enacted that no freeman should be imprisoned or detained without cause shown, to which he might make answer according to law.

Following this legislative enactment came the act of 1664, by which any one restrained of his liberty by order or decree of any illegal court, or

¹ 1 Pollock & Maitland Hist. Eng. Law, 171-173, 178, 523.

even by the command of the king himself in person, or by warrant of the council board, or of any of the privy council, should have, upon demand of his counsel, a writ of *habeas corpus* (you may have the body) to bring his body before the court of king's bench, or common pleas, who should determine whether the cause of his commitment be just, and thereupon do justice to the party accused. And by the act of 1679, commonly known as the "Habeas Corpus Act,"¹ the methods of obtaining this writ were plainly pointed out.

§ 5. **English Bill of Rights. — Excessive Bail Prohibited.** — To guard against the evasion of this act it was further enacted in the English Bill of Rights, in 1689, that excessive bail should not be required.

§ 6. **American Bill of Rights. — Due Process of Law. — Arrest without Warrant. — Trial by Jury.** — This right of immunity from illegal restraint was brought to the American shores by our forefathers and became a part of the common law of this country. Subsequently it was incorporated into the American Bill of Rights, — as embraced in the first ten amendments to the Constitution of

¹ 2 Pollock & Maitland Hist. Eng. Law, 586, 593.

the United States, — by the adoption of the fifth amendment, which provides that no person shall be deprived of his liberty without due process of law. And a similar provision exists in all the State constitutions.¹

Due process of law means that whatever the legal proceeding may be, it must be enforced by public authority, whether sanctioned by age or custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves the principles of liberty and justice.² It means that neither life, liberty, nor property can be taken,

¹ Article 12 of the Bill of Rights in the Constitution of Massachusetts, which was enacted about seven years before Amendment 5, of the Constitution of the United States, was adopted, declares "no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." This Bill of Rights was fashioned from Magna Charta.

² *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232; *Rowan v. State*, 30 Wis. 129; *King v. Berchet*, 1 Show. (Eng. K. B.) 106; *R. v. Ingham*, 5 B. & S. (Eng. Q. B.) 257; *Westervelt v. Gregg*, 12 N. Y. 202; *Bank of Columbia v. Okely*, 4 Wheat. (U. S.) 235, 4 L. ed. 559; *Brown v. Levee Commissioners*, 50 Miss. 468; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616.

nor the enjoyment thereof impaired, except in the course of the regular administration of the law in the established tribunals.¹

Therefore an arrest without a warrant, where one is required by law, is not due process of law.² But if there is likely to be a failure of justice for want of a magistrate to issue a warrant, an officer may arrest without a warrant.³ And an arrest without a warrant, where one is necessary, may be waived by the defendant pleading guilty to the complaint contained in a subsequently issued warrant.⁴

Where a warrant is required by existing laws, an authority to arrest without a warrant cannot be implied from a general grant to a municipality of power to arrest.⁵

Relating to the higher crimes, due process of law is said to denote a lawful indictment or presentment of good and lawful men,⁶ and a public

¹ *Ex parte Virginia*, 100 U. S. 366, 65 L. ed. 686.

² *Muscoe v. Com.*, 86 Va. 443, 10 S. E. 534; *State v. James*, 78 N. C. 455; *Trustees v. Schroeder*, 58 Ill. 353.

³ *Dixon v. State*, 12 Ga. App. 17, 76 S. E. 794; *Waters v. Walkover Shoe Co.*, — Ga. —, 82 S. E. 537.

⁴ *People v. Lowerie*, 163 Mich. 514, 128 N. W. 741.

⁵ *Gunderson v. Struebing*, 125 Wis. 173, 104 N. W. 149.

⁶ *Coke*, 2d Inst. 50; affirmed in *Jones v. Robbins*, 8 Gray (Mass.) 329, in which see dissenting opinion by Justice MERRICK; disaffirmed in *Hurtado v. Cali-*

trial by jury,¹ before a court of competent jurisdiction. Therefore, where the court at the trial of one charged with murder, directed an officer to stand at the door of the court-room "and see that the room is not overcrowded, but that all respectable citizens be admitted, and have an opportunity to get in when they shall apply," it was held that the right of the accused to a public trial, guaranteed to him by the constitution, had been violated.²

§ 7. **Constitutional Right cannot be Waived.** —

As a general rule the accused, at least in a felony case, cannot waive his constitutional right to a trial by a jury of twelve men; and it is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated.³ And the fact that the defendant was fornia, *supra cit.*, in which see dissenting opinion by Justice HARLAN. See also *Taylor v. Porter*, 4 Hill (N. Y.) 140; *Hoke v. Henderson*, 4 Dev. (N. C.) 1; *Jones v. Perry*, 10 Yerger (Tenn.) 59; 3 Story on Const. U. S. 661; 2 Kent's Com. 13; *Saco v. Wentworth*, 37 Me. 172; *Emerick v. Harris*, 1 Binn. (Pa.) 416; *Murphy v. People*, 2 Cow. (N. Y.) 815; *Jackson v. Wood*, 2 Conn. 819; *Beers v. Beers*, 4 Conn. 535.

¹ *People v. Murray*, 89 Mich. 276, 50 N. W. 995.

² *Ibid.*

³ *Hill v. People*, 16 Mich. 351; *Canceini v. People*, 18 N. Y. 128; *Work v. State*, 2 Ohio St. 296; *United*

negligent in raising his objections is not material.¹

In courts not of record, however, as in justices' courts, a trial by less than twelve men is legal.²

The provisions in Article III, Constitution of the United States, respecting the trial of crimes by jury, relate to the judicial power of the United States alone, and do not apply to State courts.³

§ 8. **Personal Liberty demands Restraint.** —

The assurance of personal liberty does not license

States v. Taylor, 3 McCrary (U. S. C. C.) 500; *Harris v. People*, 128 Ill. 589, 21 N. E. 563; *Brown v. State*, 8 Blackf. (Ind.) 561; *League v. State*, 36 Md. 257; *Allen v. State*, 54 Ind. 461; *Wartner v. State*, 102 Ind. 51, 1 N. E. 65; *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635; *State v. Carman*, 63 Iowa 130, 18 N. W. 691; *Bond v. State*, 17 Ark. 290; *State v. Davis*, 66 Mo. 684; *Bell v. State*, 44 Ala. 393; *Williams v. State*, 12 Ohio St. 622; *Kleinschmidt v. Dunphy*, 1 Mont. 118. *Contra*: *State v. Worden*, 46 Conn. 349; *Hallinger v. Davis*, 146 U. S. 314, 13 Sup. Ct. 105, 36 L. ed. 986; *In re Staff*, 63 Wis. 285, 23 N. W. 587; *State v. Kaufman*, 51 Iowa 578, 2 N. W. 275; *People v. Kerrigan*, 73 Cal. 222, 14 Pac. 849; *State v. Albee*, 61 N. H. 423.

¹ *Hill v. People*, 16 Mich. 351.

² *Vaughn v. Seade*, 30 Mo. 600; *Hill v. People*, 16 Mich. 351.

³ *Eilenbecker v. Plymouth Co.*, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. ed. 801; *Edwards v. Elliott*, 21 Wall. (U. S.) 557, 22 L. ed. 492.

any person to be free from restraint; on the contrary, it demands such necessary restraint of persons as will insure the utmost amount of personal liberty to each, for the safety and well-being of society are paramount to individual liberty.

§ 9. The Limit of Governmental Control. — The government has the right to control its subjects up to that point where society is safe, but it has no right to go beyond the point of safety.¹ Any law which restrains a man from doing mischief to his fellow-man increases the personal liberty of mankind, but every wanton and causeless restraint of the will of the subject is a degree of tyranny.²

§ 10. Rights of Subjects are Equal. — It is one of the most commendable features of our republican form of government that our laws are equal, just, and impartial, and that the humblest member of society has rights and remedies for the infraction of those rights, that are not exceeded by the rights or remedies of any other man, no matter how high his station. No officer of the law can, with impunity, set those rights at defiance. All officers of the government, from the

¹ Petition of Ferrier, 103 Ill. 373.

² 1 Bl. Com. 126.

highest to the lowest, are creatures of the law, and are bound to obey it.

§ 11. **Rights must be Respected.** — It is, therefore, removed from the whim or ignorance of any magistrate to issue, or of any person to serve any legal process whatever unless the provisions of law be strictly followed; and any restraint of a person, except by due process of law, amounts to a false imprisonment, for which both magistrate and officer may be liable in damages to the person deprived of his liberty, and the imprisonment may also be made the subject of a criminal prosecution.¹

A magistrate who illegally issues a warrant without a sworn complaint is liable for trespass on an arrest made on such warrant, and he cannot justify by showing that he had a reasonable suspicion that an offense had been committed.²

¹ *Fisher v. McGirr*, 1 Gray (Mass.) 45; *Stetson v. Packer*, 7 Cush. (Mass.) 564; *Stephens v. Wilkins*, 6 Pa. St. 260; *Emery v. Hapgood*, 7 Gray (Mass.) 55; *Rafferty v. People*, 69 Ill. 111; *Gurney v. Tufts*, 37 Me. 130; *Wise v. Withers*, 3 Cranch (U. S.) 337, 2 L. ed. 559; *Entick v. Carrington*, 2 Wils. (Eng. C. P.) 275; *Groome v. Forrester*, 5 M. & S. (Eng. K. B.) 314; *Allen v. Gray*, 11 Conn. 95.

² *McGuinness v. Da Foe*, 3 C. C. C. (Can.) 139; *Campbell v. Welsh*, 18 C. C. C. (Can.) 316; *Papillo v. R.*, 20 C. C. C. (Can.) 329.

CHAPTER II

THE ISSUANCE AND SERVICE OF LEGAL PROCESS

PROCESS

§ 12. **Definition.** — Process is a writ, warrant, subpoena, or other formal writing issued by authority of law; also the means of accomplishing an end, including judicial proceedings.¹

The word “process” is also used as a general term to cover all the written means of compelling a defendant to appear in court, whether in a civil or in a criminal action.

§ 13. **Statutes abrogate the Common Law.** — Any process issued according to the rules of the common law, and any act done under precedent of the weight of authority as laid down in the

¹ 3 Bl. Com. 279; *Gollobitsch v. Rainbow*, 84 Iowa 567.

judicial decisions will be valid, and will justify all persons acting therein, unless the authority of such common law and judicial precedents has been abrogated by constitutional legislative enactments; for where the common law and the statutes are in conflict, the latter always control.

JURISDICTION

§ 14. **Procured by Stratagem or Fraud.** — No court can, at common law, exercise jurisdiction over a party in a civil case unless he is served with process within the territorial jurisdiction of the court, or voluntarily appears.¹ But a person cannot claim immunity, in a criminal case, because he was enticed into the jurisdiction by stratagem and fraud,² except in case of an extradition under a treaty, it being well established that when a prisoner is before a court, legally charged with a crime for which he is to be tried, the court will not be obliged to inquire how he came there; and the want of authority for a prisoner's arrest cannot protect him from

¹ *Mex. Cent. Ry. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. ed. 699; *Kendall v. United States*, 12 Pet. (U. S.) 524, 9 L. ed. 1181; *Harris v. Hardeman*, 14 How. (U. S.) 334, 14 L. ed. 444.

² *Ex parte Brown*, 28 Fed. (U. S.) 653; *In re Doo Woon*, 18 Fed. (U. S.) 898.

prosecution.¹ So where an embezzler was kidnapped from Peru and brought forcibly to the United States, without the existing treaty powers having been invoked, although an ample treaty of extradition existed between that country and the United States, the State court may proceed to try the offender, and the United States courts can give him no relief.²

And where a felon convict, after being sen-

¹ Dow's Case, 18 Pa. St. 37; *Com. v. Wait*, 131 Mass. 417; *Ex parte Scott*, 9 B. & C. (Eng. K. B.) 446; *Lopez & Sattlers' Case*, 1 Dearsly & Bell's C. C. (Eng.) 525; *State v. Smith*, 1 Bailey (S. C.) 283; *State v. Brewster*, 7 Vt. 118; *In re Durant*, 60 Vt. 176, 12 Atl. 650; *State v. Patterson*, 116 Mo. 505, 22 S. W. 696; *State v. Day*, 58 Iowa 678, 12 N. W. 733; *State v. Ross & Mann*, 21 Iowa 467; *State v. Kealy*, 89 Iowa 94, 56 N. W. 283; *Ship Richmond v. U. S.*, 9 Cranch (U. S.) 102, 3 L. ed. 670; *Mahon v. Justice*, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. ed. 283; *Ker v. People*, 110 Ill. 627; *Mix v. People*, 26 Ill. 34; *People v. Payment*, 109 Mich. 553, 67 N. W. 689; *Ex parte Barker*, 87 Ala. 4, 6 So. 7; *Lagrange's Case*, 14 Abb. Prac. N. S. (N. Y.) 333, note; *People v. Rowe*, 4 Parker Cr. (N. Y.) 253; *Mitchell v. State*, 126 Ga. 84, 54 S. E. 931; *Cox v. City of Jonesboro*, — Ark. —, 164 S. W. 767; *Papillo v. R.*, 20 C. C. C. (Can.) 329. *Contra: In re Robinson*, 29 Neb. 135, 45 N. W. 267; *State v. Simmons*, 39 Kan. 262, 18 Pac. 177.

² *Ker v. Illinois*, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. ed. 421.

tenced to be executed for stealing a slave, was pardoned, upon the condition that he immediately leave the State and never return, he afterward violated the condition by returning to the State wherein he was pardoned; whereupon the governor of that State offered a reward for his capture. He fled from that State to an adjoining State, whence he was forcibly taken without process and brought back to the State where the crime was committed, and his motion for a discharge from arrest was refused.¹

And a creditor brought into the jurisdiction by fraud may be arrested by other creditors who did not participate in the fraud.²

§ 15. **Procured by Illegal Arrest.** — Where a party is taken from his own house for drunkenness to answer to a complaint for that offense, which had been duly made and received, it is immaterial upon the question of his guilt and punishment therefor, whether he had been arrested legally or illegally, or arrested at all before the complaint was made.³

¹ *State v. Smith*, 1 Bailey (S. C.) 283.

² *Adrience v. Lagrave*, 15 Abb. Prac. N. s. (N. Y.) 272, 47 How. Prac. (N. Y.) 71.

³ *Com. v. Conlin*, 184 Mass. 195, 68 N. E. 207.

§ 16. **Kinds of Jurisdiction.**— **Effect of Want of Jurisdiction.**— Jurisdiction of the subject-matter is always determined by law, and can never be conferred by consent or waiver of the parties,¹ but jurisdiction of the person may be determined by consent of the parties, as by failure to object.²

If the magistrate issuing the process has no jurisdiction of the subject-matter, the process is not merely voidable but wholly void, and an officer acting under it is a trespasser,³ as is also the magistrate who issues it,⁴ and the party making the complaint.⁵

If the magistrate has jurisdiction over the person and the offense, and the accused is present in court, the hearing may be lawfully proceeded with, although the warrant was served by one not legally qualified.⁶

And where an arrest is made of one commit-

¹ *Brown v. State*, 9 Okla. Cr. 382, 132 Pac. 359.

² *Rogers v. State*, 87 Ohio 308, 101 N. E. 143.

³ *Fisher v. McGirr*, 1 Gray (Mass.) 45; *Wise v. Withers*, 3 Cranch (U. S.) 337, 2 L. ed. 459; *Entick v. Carrington*, 2 Wils. (Eng. C. P.) 275.

⁴ *Stetson v. Packer*, 7 Cush. (Mass.) 564.

⁵ *Stephens v. Wilkins*, 6 Pa. St. 260; *Emery v. Hapgood*, 7 Gray (Mass.) 55.

⁶ *Ex parte Giberson*, 4 C. C. C. (Can.) 537.

ting a criminal offense and when brought before a magistrate a written charge not under oath is read to him, and he pleads thereto, the prisoner waives the form of complaint, and the magistrate has jurisdiction.¹

An unconstitutional statute, purporting to give jurisdiction, will not justify either magistrate or officer.² But lack of jurisdiction of the person will not invalidate the process if the defect does not appear on its face.³

§ 17. **Finding Prisoner Guilty of Lesser Offense than that Charged.** — If an offender is lawfully before a court charged with an offense of which the court has jurisdiction, he may, upon trial, be found guilty of a lesser offense which is a degree of the greater crime, or relates to the same transaction, if it is charged in a separate count, of which the court otherwise would have no jurisdiction.⁴ Although if the lesser crime were charged as a separate offense the court would not have jurisdiction.

¹ *R. v. McLean*, 5 C. C. C. (Can.) 67.

² *Fisher v. McGirr*, *supra cit.*

³ *Tefft v. Ashbaugh*, 13 Ill. 602; *Clarke v. May*, 2 Gray (Mass.) 410.

⁴ *People v. Rose*, 15 N. Y. S. 815. But see *Nelson v. State*, 10 Humph. (Tenn.) 518.

But where the greater and lesser offense are contained in the same count, a court may not convict of the lesser crime which is not within its jurisdiction.¹

§ 18. **Foreign Vessels.** — A foreign merchant ship coming within our harbors is subject to our local jurisdiction the same as any foreign private person.² But over a public ship, such as a man-of-war, a State court in whose port the ship is can never have jurisdiction.

§ 19. **Ceded Territory.** — Over a locality ceded by a State to the United States, the jurisdiction of the courts of the ceding State does not extend, except by a special reservation in the ceding act; and a reservation in such act, of concurrent jurisdiction to serve in the ceded locality any civil or criminal State processes, does not take from the United States its *exclusive* legislative and judicial authority; and an offense therein committed is triable in the United States courts alone.³

The federal courts also have exclusive jurisdiction over crimes committed within parts of a

¹ *State v. Nutting*, 16 Vt. 261.

² *U. S. v. Diekelman*, 92 U. S. 520, 23 L. ed. 743.

³ *Mitchell v. Tibbetts*, 17 Pick. (Mass.) 298, referring to the Charlestown navy yard.

State ceded for the purpose of arsenals, dock-yards, forts, magazines, postoffices, and all other public buildings of the United States.¹

So a State court has no jurisdiction of murder in a fort ceded to the government.²

§ 20. **Telegrams.** — An arrest on the sole authority of a telegram from a private person is made at the peril of the arresting party.³

If a peace officer is informed by a telegram from the police department of another city that a person answering the description of one suspected of murder was on a railroad train such officer may enter the train at night and force his way into the berth of such person, make an arrest and take the prisoner.⁴

To a writ of *habeas corpus* directed against a police officer and the county sheriff the defendants made return that the police officer arrested the petitioner and delivered him into the custody

¹ U. S. v. Bevens, 3 Wheat. (U. S.) 386, 3 L. ed. 416; New Orleans v. U. S., 10 Pet. (U. S.) 711, 9 L. ed. 592; Clay v. State, 4 Kan. 54; Wills v. State, 3 Heisk. (Tenn.) 142; Reynolds v. People, 1 Colo. 180; People v. Godfrey, 17 Johns. (N. Y.) 230.

² State v. Kelly, 76 Me. 331.

³ Jones v. Wilson, 119 La. 491, 44 So. 275.

⁴ Burton v. N. Y. C. & H. R. R. Co., 147 N. Y. App. Div. 557, 132 N. Y. S. 628.

of the sheriff for commitment; that he did so upon a telegram from H., the chief of police of Portland, Oregon, to the effect that the latter held a warrant for the petitioner upon a charge of forgery, and directing the arrest; that after the arrest H. sent to the officer, by telegraph, a copy of a warrant issued to and held by H. for the petitioner's arrest; that H. had sent a further telegram that he had started, with proper papers, for the petitioner; that defendants believed the petitioner guilty of said crime, made the arrest in good faith and believed that H. was en route to procure the petitioner's extradition. — *Held*, that the return was bad in showing no proof, judicial in character, that there was probable cause for the arrest.¹

In *R. v. Cloutier*, 12 Manitoba 184, the return to a writ of *habeas corpus* was as follows:

"1. I am a police officer of the City of Winnipeg in the Province of Manitoba and a peace officer, and I was such before and on and continuously since the 10th of May, 1898. Ferdinand

¹ *Simmons v. Vandyke*, 138 Ind. 380, 37 N. E. 973; *In re Henry*, 29 How. Prac. (N. Y.) 185. *Contra*, by Criminal Code: *R. v. Cloutier*, 12 Man. (Can.) 183; *R. v. Sabeans*, 7 C. C. C. (Can.) 502; *Cheng Fun v. Campbell*, 16 C. C. C. (Can.) 515.

Cloutier within named, whose body is returned herewith, on or about 20th February, 1898, at the City of Montreal in the Province of Quebec in the Dominion of Canada, with intent to defraud by false pretence, directly obtained from Doull and Gibson, of Montreal aforesaid, goods capable of being stolen of the value of \$1387 or thereabouts, knowledge whereof coming to my notice I did, on Tuesday, 10th May, 1898, as such peace officer at and in the City of Winnipeg aforesaid, arrest and now detain the said Ferdinand Cloutier without a warrant pursuant to the statute in that behalf made and provided.

"2. I am a police officer of the City of Winnipeg in the Province of Manitoba and a peace officer, and I was such before, on and continuously since 10th May, 1898. On 10th May, 1898, I received the following telegram from A. Bissonette, Chief Constable at Montreal:

'Montreal, 10th May, 1898.

J. C. McRae, Chief of Police, Winnipeg.

Please arrest Ferdinand Cloutier. Warrant against him for false pretences. Officer will be sent for him on receipt of telegram from you if arrested.

A. Bissonette, Chief Constable.'

“ On the same day I received the following additional telegram from the said Bissonette:

‘ Montreal, May 10th, 1898.

J. C. McRae, Chief of Police, Winnipeg.

Hold Ferdinand Cloutier. Detective Killert leaves with warrant. He will be with you Friday.

A. Bissonette.’

“ On said 10th May, on reasonable and probable grounds I believed and on such grounds I still believe that an offense for which the offender could be arrested without a warrant had been committed, which offense I believe to have been that Ferdinand Cloutier within named, whose body is returned herewith, on or about 20th February, 1898, at the City of Montreal in the Province of Quebec, in the Dominion of Canada, with intent to defraud by false pretence, directly obtained from Doull and Gibson, of Montreal, aforesaid, goods capable of being stolen of the value of \$1387 or thereabouts, and I at the time of the arrest of said Ferdinand Cloutier hereinafter mentioned believed that Ferdinand Cloutier within named had committed that

offense, wherefore I did, on Tuesday, 10th May, 1898, as such peace officer at and in the City of Winnipeg, arrest and now detain the said Ferdinand Cloutier without a warrant pursuant to the statute in that behalf."

This return was held good under the Canadian Code of Criminal Procedure.

ARREST

§ 21. **Modes of Making.** — An arrest may be made in four ways: 1. By warrant; 2. By an officer without warrant; 3. By a private person also without warrant; 4. By a hue and cry.¹

When the offender is not likely to abscond before a warrant can be obtained, it is in general better to apprehend him by a warrant than for a private person or officer to arrest him of his own accord, because if the justice should grant his warrant erroneously, no action lies against the party obtaining it.² But if the offender is endeavoring to escape, an officer may arrest him without a warrant which would otherwise be necessary.³

¹ 4 Bl. Com. 290.

² *Leigh v. Webb*, 3 Esp. (Eng. N. P.) 166.

³ *Porter v. State*, 124 Ga. 297, 52 S. E. 283, referring to Voorhees on Arrest, c. VI.

WARRANTS

§ 22. **Search Warrant. — Definition.** — A search warrant is a warrant requiring the officer to whom it is addressed to search a house, or other place,¹ therein specified,² for property therein alleged to have been stolen, and if the same shall be found upon such search, to bring the goods so found, together with the body of the person occupying the same, who is named, before the justice or other officer granting the warrant, or some other justice of the peace, or other lawfully authorized officer.³

§ 23. **Procedure in Issuing. — Constitutional Provisions.** — It issues on a complaint, made on oath or affirmation, by the suspecting party, and the complainant should aver that the property has been stolen, and that he has cause to suspect, and does suspect, that it is secreted in the house or place proposed to be searched,⁴

¹ In California it has been held that a search warrant may be issued to search a person. *Collins v. Lean*, 68 Cal. 284, 9 Pac. 173.

² *Com. v. Lucy*, 150 Mass. 164, 22 N. E. 628.

³ *Bouvier's Law Dict.* (Search Warrant); *Grumon v. Raymond*, 1 Conn. 40.

⁴ *Com. v. Phillips*, 16 Pick. (Mass.) 214; *Grumon v. Raymond*, *supra cit.*

which place must be described, and no place other than that described can be searched. Nor can any property other than that described be seized.

A search warrant will issue either to recover stolen property or procure evidence of a crime. In California it may be issued against a person.¹ Like other warrants, it should be signed, and, when required by statute,² sealed by the magistrate issuing it. It may be directed either to an officer, or, in case of necessity, to a private person.³

The Constitution of the United States, Article IV, Amendment, provides, "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but on probable cause,⁴ supported by oath or affirmation, and particularly describing the place to be searched and the persons or

¹ *Collins v. Lean*, 68 Cal. 284, 9 Pac. 173.

² *Millett v. Baker*, 42 Barb. (N. Y.) 215.

³ *Meek v. Pierce*, 19 Wis. 318; *Com. v. Foster*, 1 Mass. 493; 4 Bl. Com. 291; 1 Hale's P. C. 581; 2 Hawkins' P. C. c. 13, § 28; *R. v. Kendall*, 1 Ld. Raym. (Eng. K. B.) 66; *Kelsey v. Parmalee*, 15 Conn. 265; *Blatcher v. Kemp*, 1 H. Black. (Eng. C. P.) 15.

⁴ Reasonable and probable grounds is a question for the jury, and is not for the court to decide. *R. v. Smith*, 17 Man. (Can.) 200.

things to be seized." But this provision does not apply to searches and seizures made under direction of State authorities.¹ Nor to legal arrest made without a warrant; inasmuch as it is intended to prohibit general warrants only.²

Provisions, however, similar to that enacted in the Constitution of the United States, have been enacted in the various State constitutions,³ and thereby afford the citizens of the particular State ample protection against unreasonable searches and seizures. And it has been held that there is no legal right, without a warrant, to arrest and search one on information that the person is carrying concealed weapons, in that it is a violation of this constitutional provision,⁴ although evidence obtained thereby is admissible.

§ 24. Permission will justify Searching without a Warrant. — The constitutional provisions respecting search warrants apply only to cases

¹ *Spies v. Illinois*, 123 U. S. 131, 8 Sup. Ct. 21, 31 L. ed. 80; *Reed v. Rice*, 2 J. J. Marshall (Ky.) 44.

² *Com. v. Phelps*, 209 Mass. 410, 95 N. E. 868; *Wakely v. Hart*, 6 Binn. (Pa.) 316; *Burroughs v. Eastman*, 101 Mich. 419, 59 N. W. 817.

³ See Const. Mass., Part I., Art. XIV.

⁴ *Pickett v. State*, 99 Ga. 12, 25 S. E. 608; *Hughes v. Com.*, 19 Ky. Law Rep. 497, 41 S. W. 294. See § 25.

where the search is without the consent of the occupant of the premises, therefore where permission is given to search, either by the occupant or his agent, a search warrant is not necessary. So where, after the arrest of one on a charge of arson, police officers went to his place of business in the burned building, and without a search warrant, but with the permission and assistance of his agent, who was in charge of the premises, found and removed certain articles which were used as evidence against the accused at the trial, the introduction of this evidence could not be objected to as having been taken in violation of the State constitution regulating searches and seizures, or that it compelled him to give evidence against himself, because the accused was bound by the consent given by his agent, and in consequence there was no "seizure" or compulsion.¹

In a case where officers with a search warrant went to the residence of the accused and informed his mother that they had a search warrant to search for an article named therein, and offered to allow her to examine the warrant, which she declined to do, inviting the officers to make the search, in course of which a broken knife was found in the pocket of defendant's coat, the

¹ State v. Griswold, 67 Conn. 290, 34 Atl. 1046.

search having been made under the invitation and not under the warrant, the finding and taking of the knife did not constitute an abuse of legal process.¹

§ 25. **Illegal Seizure does not destroy Admissibility of Evidence obtained Thereby.** — Where papers which are pertinent to the issue are illegally taken from the possession of the party against whom they are offered as evidence, the fact of the illegal seizure cannot be offered as a valid objection to their admissibility, because the court limits the inquiry to the competency of the proffered testimony and will not stop to inquire as to the means by which the evidence was obtained.²

And where a police officer, armed with a search warrant calling for a search for intoxicating liquors upon the premises of the defendant's husband,

¹ *Com. v. Tucker*, 189 Mass. 457, 76 N. E. 127.

² *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. ed. 575; *Com. v. Dana*, 2 Mete. (Mass.) 329; *State v. Griswold*, 67 Conn. 290, 306, 34 Atl. 1046; *Williams v. State*, 100 Ga. 511, 28 S. E. 624; *Jacobs v. People*, 218 Ill. 500, 75 N. E. 1034; *Com. v. Johnson*, 213 Va. 432, 62 Atl. 1064; *State v. Barr*, 78 Vt. 97, 62 Atl. 43. But see *State v. Sheridan*, 121 Iowa 164, 96 N. W. 730, holding that if a warrant is illegally issued solely to secure evidence, such evidence obtained thereby is inadmissible.

took two letters which he found at the time, it was held that a trespasser may testify to pertinent facts observed by him, or may put in evidence pertinent articles or papers found by him while trespassing, and although he may be held responsible civilly or criminally for the trespass, his testimony is not thereby rendered incompetent.¹

Evidence that a person had concealed weapons on his person, even if unconstitutionally obtained is admissible.²

In conducting a search under a warrant there

¹ *Com. v. Tibbetts*, 157 Mass. 519, 32 N. E. 910. See also *Com. v. Acton*, 165 Mass. 11, 42 N. E. 329; *Com. v. Smith*, 166 Mass. 370, 44 N. E. 503; *Chastaug v. State*, 83 Ala. 29, 3 So. 304; *State v. Flynn*, 36 N. H. 64; *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429; *Shields v. State*, 104 Ala. 35, 16 So. 85; *Bacon v. United States*, 97 Fed. 35; *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1021; *Williams v. State*, 100 Ga. 511, 28 S. E. 624; *State v. Pomeroy*, 130 Mo. 489, 32 S. W. 1002; *Guidrat v. People*, 138 Ill. 103, 27 N. E. 1085; *Trask v. People*, 151 Ill. 523, 38 N. E. 248; *Starchman v. State*, 62 Ark. 538, 36 S. W. 940; *People v. Adams*, 85 N. Y. App. Div. 390, 83 N. Y. S. 481; *State v. Van Tassel*, 103 Iowa 6, 72 N. W. 497; *State v. Kaub*, 15 Mo. App. 433; *Legatt v. Tollervey*, 14 East (Eng. K. B.) 302.

² *Scott v. State*, 113 Ala. 64, 21 So. 425; *Springer v. State*, 121 Ga. 155, 48 S. E. 907.

is no right to do unnecessary damage, and officers who in good faith, under a search warrant, search a building for liquors illegally kept have no right unreasonably to tear open the walls of a building in prosecuting the search.¹

§ 26. **Purposes for which a Search Warrant will Issue.** — The purposes for which a search warrant will issue are usually fully described by statute,² and generally embrace the search for stolen property, intoxicating liquors, gaming implements, counterfeit money, and instruments used in making it, and other articles made, sold, or kept in violation of law.

§ 27. **Bench Warrant. — Definition.** — A bench warrant is a process issued by a judge from the bench, that is, by the court itself, for the arrest of a person, either in a case of contempt of court, or after an indictment has been found, or to bring in a witness who has not obeyed the subpoena. It requires all the formalities of other warrants of arrest.

The only purpose of the term "bench warrant" is to distinguish it from a warrant issued by a magistrate, who may be a judge not sitting officially, or a justice of the peace, whereas a

¹ *Buckley v. Beaulieu*, 104 Me. 56, 71 Atl. 70.

² See Rev. Laws of Mass. c. 217, §§ 1-8.

bench warrant is always issued by a judge at an official sitting. It is the usual warrant to issue after an indictment has been found.

A bench warrant is bad which does not direct that the party shall be brought before some judge or justice.¹

§ 28. **Warrant of Arrest. — Definition. — Injunction.** — A warrant of arrest is a legal process issued by competent legal authority, directing the arrest of a certain person, or persons, upon sufficient grounds, which must be stated in the warrant.²

A warrant must be signed by the issuing magistrate in his official capacity, and not merely as an individual.³ But if the full designation of his office and jurisdiction is recited in the body of the warrant it need not be added to his signature.⁴

An injunction does not lie to restrain an illegal arrest, and this is for the reason that the person illegally arrested has his remedy in a writ of *habeas corpus* and an action for damages.⁵

¹ *Queen v. Downey & Jones*, 7 Q. B. (Eng.) 281.

² *Drennan v. People*, 10 Mich. 169.

³ *Reach v. Quinn*, 159 Ala. 340, 48 So. 540.

⁴ *R. v. Lee Chu*, 14 C. C. C. (Can.) 322.

⁵ *Murphy v. Board, etc.* 63 How. Prac. (N. Y.) 396; *Davis v. The A. S. P. C. A.* 75 N. Y. 362.

§ 29. **Issuing Magistrate need not have Trial Jurisdiction.** — A warrant is usually issued by a magistrate having jurisdiction to try the offense, but a justice of the peace who has no jurisdiction to try an offense may act in a ministerial capacity, and issue a warrant returnable before a court which has the necessary trial jurisdiction.¹

§ 30. **What Executing Officer must Know.** — An officer called upon to execute a warrant is charged with two duties which he must observe in order to insure his own freedom from liability. He must know (1) that the magistrate, or court who issues the warrant has general jurisdiction of the subject-matter,² and (2) that the warrant is valid upon its face.³

¹ *Com. v. Roark*, 8 Cush. (Mass.) 210. See also *Gold v. Bissell*, 1 Wend. (N. Y.) 217.

² *State v. McDonald*, 3 Dev. (N. C.) 471; *Allen v. Gray*, 11 Conn. 95; *Tellefson v. Fee*, 168 Mass. 188, 46 N. E. 562; *Stephens v. Wilkins*, 6 Pa. St. 260; *Earl v. Camp*, 16 Wend. (N. Y.) 562; *Ela v. Shepard*, 32 N. H. 277; *Hines v. Chambers*, 29 Minn. 7, 11 N. W. 129; *Hann v. Lloyd*, 21 Vroom (N. J.) 1. *Contra*: *Emery v. Hapgood*, 7 Gray (Mass.) 55.

³ *Emery v. Hapgood*, *supra cit.*; *Clark v. Woods*, 2 Exch. (Eng.) 395; *Pearce v. Atwood*, 13 Mass. 324; *Eames v. Johnson*, 4 Allen (Mass.) 382; *Thurston v. Adams*, 41 Me. 419; *Brown v. Howard*, 86 Me. 342, 29 Atl. 1094; *Rosen v. Fischel*, 44 Conn. 371; *Frazier*

§ 31. **How far a Warrant Valid upon its Face protects the Officer.** — From the decisions it does not seem clear as to just how far an officer is protected by a warrant that is valid upon its face.

One line of cases seems to hold that, on the ground of public policy, and in order to secure prompt and effective service of legal process, officers, and those acting under them, need only to look upon the warrant, and if that is fair and valid upon its face, showing no defect or want of jurisdiction, the officer may justify under it, although it is wholly void,¹ and that he need not take notice of extrinsic facts.²

While another line of reasoning, which seems to be the weight of authority, is that a warrant is void upon its face if the whole proceeding in which it was issued was beyond the jurisdiction of the issuing court, and that if the officer knows the facts in the case he is conclusively presumed to know the law, and therefore liable.

So where a justice of the peace issued a warrant for the collection of road taxes, not having jurisdiction over such taxes, the officer was held liable

v. Turner, 76 Wis. 562, 45 N. W. 411; *Sheldon v. Hill*, 33 Mich. 171; *Poult v. Slocum*, 3 Blackf. (Ind.) 421.

¹ *Emery v. Hapgood*, 7 Gray (Mass.) 58.

² *People v. Warren*, 5 Hill (N. Y.) 440.

for executing the warrant.¹ And where, by treaty of 1827 between the United States and Sweden and Norway,² exclusive jurisdiction in an action for wages brought by a Norwegian sailor against the captain of a Norwegian vessel was given to the Norwegian consul of the particular port in which the vessel was lying, the courts of the United States have no jurisdiction; and an officer who serves a warrant issued by a municipal court after these facts have been brought to his attention, is liable, although the want of jurisdiction is not apparent on the face of the warrant, which is in proper form.³

If the process is void upon its face, it is no protection whatever, and the officer or other party who serves it is liable civilly and criminally. If he kills in the act of serving the process, it is murder.

§ 32. Ignorance of the Law is no Excuse. —
If either the jurisdiction or warrant is faulty, the

¹ *Stephens v. Wilkins*, 6 Pa. St. 260.

² 8 U. S. Stats. 346, 352.

³ *Tellefson v. Fee*, 168 Mass. 188, 46 N. E. 562. See also *Warren v. Kelley*, 80 Me. 512, 15 Atl. 49; *Batchelder v. Currier*, 45 N. H. 460; *Campbell v. Sherman*, 35 Wis. 103; *Leachman v. Dougherty*, 81 Ill. 324.

fact that the officer does not know the law governing these matters will not excuse him,¹ because every one is conclusively presumed to know the law, the well-settled maxim of the law being, "Ignorance of the law excuses no one."

§ 33. **Ignorance of Fact may Excuse.** — But although ignorance of the law is no excuse, ignorance of fact may be a valid excuse; and if the officer is ignorant of jurisdictional facts, which ignorance is not attributable to his own negligence, he may justify by a process that is fair and valid upon its face.

§ 34. **Officer must serve Void Warrant if the Defect is not on its Face.** — On the other hand, if the warrant is void, for any cause other than want of jurisdiction, and the officer knows it, he is protected in serving it if the defect does not appear on its face;² and he has no right to refuse to

¹ *Sandford v. Nichols*, 13 Mass. 286; *Fisher v. McGirr*, 1 Gray (Mass.) 1, 45; *Warren v. Kelley*, 80 Me. 512, 15 Atl. 49; *Batchelder v. Currier*, 45 N. H. 460; *Thurston v. Martin*, 5 Mason (U. S. C. C.) 497; *Campbell v. Sherman*, 35 Wis. 103; *Sumner v. Beeler*, 50 Ind. 341; *The Marshalsea*, 10 Rep. (Eng. K. B.) 68 b; *Crepps v. Durden*, Cowp. (Eng. K. B.) 640; *Watson v. Bodell*, 14 M. & W. (Eng. Exch.) 57.

² *Kennedy v. Dunclee*, 1 Gray (Mass.) 65; *Parsons v. Loyd*, 3 Wils. (Eng. C. P.) 345; *Gasset v. Howard*,

serve a warrant, issued by a court of competent jurisdiction, if it is valid on its face, even though it be void.¹

If there is an insufficiency in the complaint, the officer is not liable if the defect does not appear on the face of the warrant,² because he has the right to rely upon the warrant alone.³

A clerical mistake in copying the facts from the complaint, at least in the matter of a date, does not make the warrant invalid, if it is not misleading;⁴ and failure to state in a warrant that the information was on oath is an irregularity only.⁵

A warrant defective in form as not charging an offense, is not void on its face if it is issued for a crime within the jurisdiction of the issuing magistrate, and the officer to whom it is directed

10 Ad. & El. N. S. (Eng. Q. B.) 454; *Allison v. Rheam*, 3 S. & R. (Pa.) 139.

¹ *Wilmarth v. Burt*, 7 Metc. (Mass.) 257; *Tarlton v. Fisher*, 2 Doug. (Eng. K. B.) 671; *Cameron v. Lightfoot*, 2 W. Bl. (Eng. K. B.) 1190.

² *Donahoe v. Shed*, 8 Metc. (Mass.) 326; *Com. v. Murray*, 2 Va. Cases 504.

³ *Wilmarth v. Burt*, *supra cit.*

⁴ *Heckman v. Swartz*, 64 Wis. 48, 24 N. W. 473.

⁵ *Kingston v. Wallace, et al.*, 25 N. B. R. (Can.) 573. See also *Friel v. Ferguson*, 15 U. C. C. P. (Can.) 584.

is protected thereby against an assault by the person arrested.¹

§ 35. **Return of Warrant is Necessary to its Validity. — Definition.** — But even though a warrant be issued by a court of competent jurisdiction over both party and subject-matter, and though the warrant be fair and valid upon its face, it is of no protection whatever to the officer if he does not return it to court after he serves it.²

A return is an official statement by an officer of what he has done in obedience to a command from a superior authority, or why he has done nothing, whichever is required.³

§ 36. **Life of a Warrant.** — A warrant remains in force until it is returned; ⁴ even if the accused has been arrested and escapes, he may be taken again on the same warrant, if it has not been returned. But an appeal duly lodged against a conviction suspends the original warrant on

¹ *State v. Gupton*, — N. C. — , 80 S. E. 989.

² *Brock v. Stimson*, 108 Mass. 520; *Tubbs v. Tukey*, 3 Cush. (Mass.) 438; *Dehm v. Hinman*, 56 Conn. 320. See also *Com. v. Tobin*, 108 Mass. 426; *Shorland v. Govett*, 5 B. & C. (Eng. K. B.) 485; *Middleton v. Price*, 1 Wils. (Eng. C. P.) 17.

³ *State v. Bulkeley*, 61 Conn. 287, 23 Atl. 186.

⁴ *State v. Nadeau*, 97 Me. 275, 54 Atl. 725; *State v. Shaw*, 73 Vt. 149, 50 Atl. 863.

which an arrest was made, and the defendant cannot be re-arrested thereon.¹ After the return of the warrant, however, it has no validity; nor can it be altered,² for its life is then extinct.

§ 37. **Effect of the Return. — Amending Return.**

— The effect of the return by the officer is that, as against himself,³ it is conclusive proof of the service and of the other facts which it recites, while as against the parties, it is at least *prima facie* proof,⁴ and in most States it is conclusive proof against the parties also.⁵ In an action against a public officer his return is *prima facie* but not conclusive evidence in his favor, although it is conclusive in the suit in which it is made.⁶ Nor is a return of a rescue on a writ conclusive evidence in behalf of the officer in an action brought against him for the escape of a prisoner.⁷

¹ *R. v. Trottier*, 22 C. C. C. (Can.) 102.

² *Com. v. Roark*, 8 Cush. (Mass.) 210.

³ *Blue v. Com.*, 2 J. J. Marshall (Ky.) 26; *Benjamin v. Hathaway*, 3 Conn. 528; *Hensley v. Rose*, 76 Ala. 373.

⁴ *Watson v. Watson*, 6 Conn. 334; *Newell v. Whigham*, 102 N. Y. 20, 6 N. E. 673.

⁵ *Nichols v. Nichols*, 96 Ind. 433; *Green v. Kindy*, 43 Mich. 279, 5 N. W. 297.

⁶ *McGough v. Wellington*, 6 Allen (Mass.) 505.

⁷ *Whitehead v. Keyes*, 3 Allen (Mass.) 495; *Barrett v. Copeland*, 18 Vt. 67.

An officer will not be permitted to introduce evidence to show that although he has omitted to mention in his return that he has done things which he should have done, he has nevertheless done them.¹ And he will not be allowed to contradict his own return for his own benefit.²

The return, by permission of the court, may be amended by the officer.³ And a sheriff's return on process may be amended to show service on the proper person if the record shows that fact.⁴

§ 38. **Warrants in Blank are Void.** — A warrant must not be issued in blank with view of later writing in the name of the defendant.⁵ Such warrants are absolutely void.

§ 39. **General Warrants are Void and Prohibited.** — A warrant directing an officer to arrest any person he may find violating the law is void.⁶ Nor can a warrant be legally issued in

¹ *Grant v. Shaw*, 1 Root (Conn.) 526.

² *Purington v. Loring*, 7 Mass. 388; *Gardner v. Hosmer*, 6 Mass. 324.

³ *Johnson v. Stewart*, 11 Gray (Mass.) 181; *Lake's Case*, 15 R. I. 628; *Dwiggins v. Cook*, 71 Ind. 579.

⁴ *International Harvester Co. v. Commonwealth*, 147 Ky. 655, 145 S. W. 393.

⁵ *Rafferty v. People*, 69 Ill. 111. But see *Bailey v. Wiggins*, 5 Harr. (Del.) 462, holding such warrants valid.

⁶ *Holmes v. Le Fers*, 36 Okla. 729, 129 Pac. 718.

a general way against any one of a certain class of persons;¹ or to arrest all suspected persons,² or to arrest the associates of the accused, without further description of such associates;³ but a statute may authorize the arrest, without warrant, of any one of a certain class, as, for example, vagrants, prostitutes, and such like.⁴

If the description in a warrant is so general that it may be applied to different persons, it is open to the objection that it is a general warrant,⁵ and is for that reason in violation of the Constitution of the United States, Article IV, Amendment, which requires a particular description of a person to be seized,⁶ and any person whose arrest is attempted thereunder is justified in resisting such unlawful arrest.

§ 40. Warrant must particularly describe the Party to be Arrested. — A warrant may be valid although it does not contain the name of the person whose arrest is directed. But for want of

¹ *Com. v. Crotty*, 10 Allen (Mass.) 403; *Mead v. Haws*, 7 Cow. (N. Y.) 332.

² *Grumon v. Raymond*, 1 Conn. 40.

³ *Wells v. Jackson*, 3 Munf. (Va.) 458.

⁴ *Money v. Leach*, 3 Burrows (Eng. K. B.) 1766.

⁵ *Com. v. Crotty*, 10 Allen (Mass.) 404.

⁶ *West v. Cabell*, 153 U. S. 78, 14 Sup. Ct. 752, 38 L. ed. 643.

the true name of such person, the fact that the true name is unknown should be stated in the warrant, and there must be such sufficient description of him in the warrant that he may be identified therefrom; as, for example, stating his occupation, his personal appearance, and peculiarities, the place of his residence, or other circumstances of identification.¹

§ 41. **Officer must rely on Name Alone.**—Where a warrant gives a fictitious name, without stating that the name is fictitious, and that the true name is unknown, and follows with a description of the person, the officer must rely on the name alone, and cannot justify the arrest of a party whose name is other than that appearing in the warrant, even though he is the party described and intended. As where a warrant was issued against "John Doe, the person carrying off the cannon," the arrest of Levi Mead is not justifiable, although he was taken in the act of carrying off the cannon, and was the person intended.²

¹ *Com. v. Crotty*, 10 Allen (Mass.) 403; *West v. Cabell*, 153 U. S. 78, 14 Sup. Ct. 752, 38 L. ed. 643; *Spear v. State*, 120 Ala. 351, 25 So. 46; *Harwood v. Siphers*, 70 Me. 464.

² *Mead v. Haws*, 7 Cow. (N. Y.) 332; *West v. Cabell*, 153 U. S. 78, 14 Sup. Ct. 752, 38 L. ed. 643;

§ 42. **Never Sufficient that Intended Party was Arrested.** — It is never sufficient that the party intended to be arrested was the one actually apprehended, unless the statute of the jurisdiction so provides. The warrant must so describe the party arrested that he may know whether he is bound to submit. So where the complaint was against "John R. Miller," and the warrant commanded the arrest of "the said William Miller," the officer was not justified in arresting John R. Miller, although it was proved that he was the person intended.¹

§ 43. **Party known by two Names may be arrested under Either.** — But where a person is known by two names, and equally well by either, a warrant may command his arrest under either name, even though it be the wrong one.²

§ 44. **No Protection to Officer who serves a Warrant without Authority.** — An officer cannot *Harris v. McReynolds*, 10 Col. App. 532, 51 Pac. 1016. *Contra*, by statute in Arizona: *Tidball v. Williams*, 2 Ariz. 50, 8 Pac. 351.

¹ *Miller v. Foley*, 28 Barb. (N. Y.) 630. See also *Griswold v. Sedgwick*, 6 Cow. (N. Y.) 455.

² *Shadgett v. Clipson*, 8 East (Eng. K. B.) 328; *Cole v. Hindson*, 6 T. R. (Eng.) 234.

be protected by a warrant that is not issued to himself to serve, nor is he protected unless he has authority to serve it.¹

§ 45. **The Requisites of a Valid Warrant.** — It is somewhat difficult to say just what are the requisites of a valid warrant, but in a general way it may be said that a warrant must have all the requisites demanded by the constitutional and statutory provisions of the particular State in which it is issued; it must show on its face that it was issued by a magistrate having jurisdiction of both party and subject-matter;² and here it may be noted that where the magistrate has no jurisdiction, it cannot be conferred by the consent of the party defendant.³ It must state the offense with which the party is charged, which must be an offense against the law,⁴ and that the necessary complaint on oath or affirma-

¹ *Reynolds v. Orvis*, 7 Cow. (N. Y.) 269; *Wood v. Ross*, 11 Mass. 271; *Paul v. Vankirk*, 6 Binn. (Pa.) 123; *State v. Wenzel*, 77 Ind. 428; *O'Malia v. Wentworth*, 65 Me. 129; *Winkler v. State*, 32 Ark. 539.

² *In re Bonner*, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. ed. 149; *Reynolds v. Orvis*, *supra cit.*; *Fisher v. Shattuck*, 17 Pick. (Mass.) 252.

³ *People v. Campbell*, 4 Parker Cr. Rep. (N. Y.) 386.

⁴ *People v. Mead*, 92 N. Y. 415; *Johnson v. State*, 73 Ala. 21; *State v. Jones*, 88 N. C. 671.

tion was made.¹ It must show the time of issuance,² and the authority to issue.³ It must correctly name the defendant, or so accurately describe him that from the description he may be identified.⁴ It must be directed to the proper officer, either by name, or by a description of the office which he holds.⁵ It must *command* the arrest,⁶ and not leave it optional with the officer to arrest or not as he may choose,⁷ and command the officer to bring the defendant before some authorized magistrate.⁸

A warrant should bear the signature of the

¹ *Caudle v. Seymour*, 1 Q. B. (Eng.) 889; *Grumon v. Raymond*, 1 Conn. 40.

² *Donahoe v. Shed*, 8 Metc. (Mass.) 326.

³ *Com. v. Ward*, 4 Mass. 497; *Halstead v. Brice*, 13 Mo. 171.

⁴ *Com. v. Crotty*, 10 Allen (Mass.) 403; *West v. Cabell*, 153 U. S. 78, 14 Sup. Ct. 752, 38 L. ed. 643; *Miller v. Foley*, 28 Barb. (N. Y.) 630.

⁵ *R. v. Weir*, 1 Barn. & Cres. (Eng. K. B.) 288; *Com. v. Foster*, 1 Mass. 493; *Com. v. Moran*, 107 Mass. 239.

⁶ *Abbott v. Booth*, 51 Barb. (N. Y.) 546; *State v. Merritt*, 83 N. C. 677.

⁷ *Abbott v. Booth*, *supra cit.*

⁸ *Stetson v. Packer*, 7 Cush. (Mass.) 562; *Com. v. Wilcox*, 1 Cush. (Mass.) 503; *R. v. Downey*, 7 Q. B. (Eng.) 281; *Bookhout v. State*, 66 Wis. 415, 1 N. W. 167; *Genin v. Tompkins*, 12 Barb. (N. Y.) 287; *Murphy v. State*, 55 Ala. 252.

justice who issues it, contain all the statutory requirements, which generally include a seal,¹ and be dated. It should contain a command to the officer to make a return thereof and his doings thereon. But the want of such command does not excuse him from the obligation of making a proper return.²

Where the statute authorizes a city attorney to issue warrants, the signature of such attorney to the warrant is sufficient.³

§ 46. Warrant must be in Possession of Officer.

— The officer or private person making an arrest with a warrant, in a case where a warrant is necessary,⁴ must have the warrant in his possession at the time of making the arrest;⁵ and it is immaterial whether the person taken has de-

¹ In Massachusetts, it is provided that justices and special justices of police, district, and municipal courts may issue warrants under their own hands and seals. Rev. Laws of Mass. c. 160, § 35. A trial justice, however (not having an official seal), may issue a warrant under his hand alone. Rev. Laws of Mass. c. 216, § 3.

² *Tubbs v. Tukey*, 3 Cush. (Mass.) 438.

³ *State v. Dibble*, 59 Conn. 168, 22 Atl. 155.

⁴ *People v. Shanley*, 40 Hun (N. Y.) 477; *Codd v. Cabe*, 13 Cox C. C. (Eng.) 202.

⁵ *Webb v. State*, 51 N. J. L. 189, 17 Atl. 113; *Smith v. Clark*, 53 N. J. L. 197, 21 Atl. 491. But see *Cabell v. Arnold*, 86 Tex. 102, 23 S. W. 645.

manded an inspection of the warrant, for it is the legal right of the person arrested that such shall be the situation, and therefore where the situation does not exist, the arrest is a legal wrong.¹

The fact that the arrested party knows that a warrant has been issued will not relieve the arresting party of the necessity of having the warrant with him.² And there is no such thing as *constructive* possession of a warrant.³

But where a sheriff is armed with a warrant, his deputy may make an arrest within the sight or hearing of the superior officer, although the warrant is not actually in his possession.⁴

And even where a warrant is necessary to a legal arrest, if there is likely to be a failure of justice for want of a magistrate to issue a warrant, an officer may arrest without a warrant.⁵

§ 47. **Warrants may issue on Sunday.** — In absence of statute, a warrant may be issued on

¹ *Smith v. Clark*, 53 N. J. L. 189, 21 Atl. 491; *O'Halloran v. McGuirk*, 167 Fed. 493.

² *People v. Shanley*, 40 Hun (N. Y.) 477. ³ *Ibid.*

⁴ *People v. McLean*, 68 Mich. 480, 36 N. W. 231; *Kirbie v. State*, 5 Tex. App. 60; *Ex parte McManus*, 32 N. B. R. (Can.) 481; *Com. v. Black*, 12 Pa. Co. Ct. 31; *People v. Moore*, 2 Doug. (Mich.) 1; *Hill v. State*, 8 Ga. App. 77, 68 S. E. 614.

⁵ *Dixon v. State*, 12 Ga. App. 17, 76 S. E. 794.

Sunday,¹ but no arrest, except in cases of treason, felony, or breach of the peace, can be made on Sunday,² and an arrest on Sunday, of one in default of payment of a fine is void.³

§ 48. **Authority to alter a Warrant.** — No person, other than the issuing magistrate, has the right to alter a warrant,⁴ because if altered by a third party it would not be the warrant issued by the magistrate who signed it.

§ 49. **Arrest in Different County.** — In absence of statutory authority, no arrest can be made in one county in a State, on a warrant issued by a justice of the peace or judge of another county in that State, unless the warrant is indorsed by a justice of the peace or judge of the county in which the arrest is made,⁵

¹ *Pearce v. Atwood*, 13 Mass. 347.

² *Wilson v. Tucker*, 1 Salk. (Eng. K. B.) 78; Stat. 29, Car. II. c. 7.

³ *Ex parte Frecker*, 33 C. L. J. (Can.) 248.

⁴ *Haskins v. Young*, 2 Dev. & B. (N. C.) 527; *Wells v. Jackson*, 3 Munf. (Va.) 458.

⁵ *Jones v. State*, 26 Tex. App. 1, 9 S. W. 53; *Ressler v. Peats*, 86 Ill. 275; *Copeland v. Islay*, 2 Dev. & B. (N. C.) 505; *Ledbetter v. State*, 23 Tex. App. 247, 5 S. W. 226; 4 Bl. Com. 291. The form of endorsement authorizing an arrest in another county may be as follows:

unless the statutes of the state otherwise provide.¹

Where an accused was arrested in a different county on an unendorsed warrant, which some hours after the arrest was properly endorsed it was held that the illegality of the arrest existed only to the time of the endorsement and that the accused thereafter was lawfully in custody.²

§ 50. **Warrant may be Valid without a Seal.** — A warrant ought to be under the hand and seal of the justice, but it seems sufficient if it be in writing and signed by him, unless a seal is expressly required by statute.³

This warrant may be executed in county of *Cook*.

L. Hird, Justice of the Peace, for the county of *Cook*, State of *Illinois*.

¹In Massachusetts, if the defendant escape from, or is out of the county in which the warrant is issued, the officer may pursue and take him in any county in the Commonwealth, as if in his own county. Rev. Laws, c. 217, § 28.

²*Southwick v. Hare, et al.*, 24 O. R. (Can.) 528.

³*Padfield v. Cabell*, Willes Rep. (Eng. C. P.) 411. A warrant of arrest is valid if it has the signature of the magistrate; the seal is no longer necessary. *Burley v. Griffith*, 8 Leigh (Va.) 442. *Contra*: *Tackett v. State*, 3 Yerger (Tenn.) 392. At common law, a seal was not necessary to a warrant issued by a justice of the peace, and is only made so, even in criminal cases,

The warrant of a commissioner of the United States is not void for lack of a seal, because such commissioner has no official seal and is not required by statute to affix one to warrants issued by him.¹

when specifically required by statute. *Millett v. Baker*, 42 Barb. (N. Y.) 215. "We are of the opinion that there was no settled rule at common law invalidating warrants not under seal, unless the magistrate issuing the warrant had a seal of office, or a seal was required by statute." Chief Justice FULLER, in *Starr v. U. S.*, 153 U. S. 619, 14 Sup. Ct. 919, 38 L. ed. 843.

¹*Starr v. U. S.*, 153 U. S., 614, 14 Sup. Ct. 919, 38 L. ed. 843.

CHAPTER III

WHO MAY ISSUE A WARRANT

§ 51. **Mandamus may compel Justice to Act.**— A justice before whom a complaint is laid, is bound to take some direct action on the facts laid in the complaint, and if he refuse to consider the facts, or what is of the same effect, if he decline to issue the warrant because of some reason not disclosed by the evidence before him, a mandamus will lie to compel the justice to take some action on the facts before him. But the limit of the writ of mandamus will be to compel action, and not to dictate what that action shall be.¹

The fact that a magistrate did not properly appreciate the evidence before him, is no ground for the issuing of a mandamus to compel him to grant a warrant against his opinion.²

§ 52. **Constitutional Provision.**— It is prescribed by the Constitution of the United States,

¹ 15 Eng. Rul. Cases 127; *Hempstead Co. v. Graves*, 44 Ark. 317.

² *Thompson v. Desnoyers*, 3 C. C. C. (Can.) 68.

Article IV, Amendment, that no warrant shall issue "except upon probable cause supported by oath or affirmation," and the constitutions of the several States have similar provisions.¹

THE COMPLAINT

§ 53. **Who may make Complaint. — Nature of Complaint. — Internal Revenue Violations.** — It is usually provided by statute that any person having knowledge of the commission of an offense for which a warrant may lawfully issue, may make a written complaint, subscribed by him, together with the required oath or affirmation before the proper officer, whereupon the warrant may issue.²

Any statement under oath, even if crude and imperfectly drawn, if it brings to the magistrate's notice that a crime has been committed, is sufficient to justify the issuing of a warrant for the arrest of the party charged with the offense.³

When an arrest is made without a warrant, the arresting party should, upon delivering his prisoner to the proper authority, immediately make a complaint setting forth the offense for

¹ See Const. of Mass. Part I., Art. XIV.

² Rev. Laws of Mass. c. 217, § 22.

³ *People v. Kingston*, 27 N. Y. Cr. R. 184, 139 N. Y. S. 649.

which the arrest was made. Without the complaint the court would not have jurisdiction to try or dispose of the cause.¹

For violation of internal-revenue laws the federal Act of May 28, 1896, c. 252, § 10 provides that "Warrants of arrest for violations of internal-revenue laws may be issued by United States commissioners upon the sworn complaint of a United States district attorney, assistant United States district attorney, collector, or deputy collector of internal-revenue or revenue agent or private citizen, but no such warrant of arrest shall be issued upon the sworn complaint of a private citizen unless first approved in writing by a United States district attorney."

The Canadian Criminal Code, §§ 588, 843, provides that before a warrant can be issued to compel the attendance of the accused, there must be an information in writing and under oath.²

And the facts on which the complainant's suspicion is founded must be inquired into by the issuing magistrate.³

¹ *Tracy v. Williams*, 4 Conn. 107; *Bingham v. State*, 59 Miss. 530; *Prell v. McDonald*, 7 Kan. 426.

² *R. v. McDonald*, 3 C. C. C. (Can.) 287.

³ *Ex parte Grundy*, 12 C. C. C. (Can.) 65; *R. v. Lorrimer*, 14 C. C. C. (Can.) 432.

§ 54. **Not necessarily made in Writing.** — Unless required by statute, the complaint need not be in writing.¹

§ 55. **Who may issue Warrants.** — The statutes of the particular State in which the arrest is to be made usually designate the officers who have powers to issue warrants of arrest.²

In Massachusetts, a justice or special justice of a district court may receive complaints and issue warrants when the court is not in session; and it is to be presumed that the justice acted within the authority given him, and that the court was not in session when the warrant was issued.³

§ 56. **Warrant issued without Complaint is Illegal. — Invalid Complaint.** — A magistrate is not bound to give his reasons for refusing to issue a warrant.⁴ But it is the duty of the magistrate before issuing a warrant to require evidence on oath amounting to a direct charge, or creating a

¹ *State v. Killett*, 2 Bailey (S. C.) 289.

² In Massachusetts, warrants may be issued by justices of the supreme judicial court, of the superior court, or of the police, district, or municipal courts, and trial justices. Rev. Laws of Mass. c. 217, § 21.

³ *Com. v. Lynn*, 154 Mass. 405, 28 N. E. 289.

⁴ *Thompson v. Desnoyers*, 3 C. C. C. (Can.) 68.

strong suspicion of guilt.¹ If he issues a warrant without inquiring into the grounds on which the accused was suspected, he is liable to the accused on an arrest thereunder, when the complaint was not justified.²

If he in his discretion refuses a warrant of arrest for an indictable offense he will not be interfered with by a mandamus, nor will a mandamus be granted where a magistrate upon reconsideration, has directed the withdrawal of a warrant before its execution.³

A warrant issued upon common rumor and report of the guilt of the accused, though it recites that there was danger of his escaping before witnesses could be summoned to enable the judge to issue it upon oath, is illegal, and the officer was justified in refusing to serve it,⁴ because it was void upon its face.

A magistrate, who issues a warrant on the complaint of one who has no legal authority to make it, is personally liable for the false imprisonment on an arrest made with such illegal warrant, as

¹ *Com. v. Phillips*, 16 Pick. (Mass.) 214; *State v. Mann*, 5 Ired. (N. C.) 45.

² *Maurfina v. Sauv  *, 6 C. C. C. (Can.) 275.

³ *R. v. Biddinger*, 22 C. C. C. (Can.) 217.

⁴ *Connor v. Com.*, 3 Binn. (Pa.) 38.

is also the person who made the complaint and the officer who served the warrant.¹

§ 57. **Constitutional Provisions.** — There being some doubt whether the common law absolutely required that a warrant should issue only upon information on oath, the clause concerning probable cause on oath was added to the fourth amendment to the Constitution of the United States. The legal effect of this provision of the Constitution is that process of any kind for the arrest of a person on a criminal charge is void, unless issued upon sufficient information under oath, and an arrest thereon is unlawful.²

§ 58. **"Subscribed" means "Written Beneath."** — When the statute requires that a complaint shall be "subscribed," that is, written beneath, it is not sufficient that the signature of the complainant be placed below the description of the goods stolen, and above the charge of larceny,³ for, said the court in this case, "Such looseness and carelessness in instituting criminal proceedings are not to be encouraged."

¹ Goodell v. Tower, 77 Vt. 61, 58 Atl. 790.

² Sprigg v. Stump, 8 Fed. (U. S.) 207. *Contra*: State v. Killett, 2 Bailey (S. C.) 289.

³ Com. v. Barhight, 9 Gray (Mass.) 113.

§ 59. Statutory Jurisdiction implies Power to Arrest. — Where a statute gives a justice jurisdiction over an offense, it impliedly gives him power to apprehend any person charged with such offense, and especially after a party has neglected a summons.¹

In any proceeding of a criminal nature, and brought in the name of the commonwealth, a justice has authority to proceed by a warrant of arrest or a summons at his discretion. The power of arrest is laid down to attend all offenses which justices of the peace have authority, by statute, to punish. It is necessary to prevent the escape of transient and irresponsible persons, and yet should be exercised with caution and moderation.²

§ 60. Warrant directed to a Private Person. — Cannot be Deputized. — It has been decided that warrants may be directed to private persons as well as officers,³ but a warrant may be directed to a private person only in case of necessity, and

¹ *Bane v. Methuen*, 2 Bing. (Eng. C. P.) 63.

² *Com. v. Borden*, 61 Pa. St. 272.

³ *Dehm v. Hinman*, 56 Conn. 320, 15 Atl. 741; *Doughty v. State*, 33 Tex. 1; *State v. Ward*, 5 Harr. (Del.) 496; *Dietrichs v. Schaw*, 43 Ind. 175; *Hayden v. Songer*, 56 Ind. 42.

when that necessity is expressed in the warrant.¹ A private person cannot depute another to serve a warrant directed to him, although he may demand assistance.

§ 61. **Warrant directed to Officer.** — **Prosecutor.** — Warrants may be directed to officers either by their particular names, or by the description of their office; and it has been decided that in the first case the officer may execute the warrant anywhere within the jurisdiction of the magistrate who issued it; in the latter case not beyond the precincts of his office. And where a warrant of a magistrate was directed, "To the constables of W. and to all other his majesty's officers," it was held that the constables of W., their names not being inserted in the warrant, could not execute it out of the district.²

Where a peace officer makes a complaint solely

¹ *Com. v. Foster*, 1 Mass. 493; *Meek v. Pierce*, 19 Wis. 318. The following form may be used to express the necessity of direction to a private person:

There being no officer at hand, I hereby depute, authorize, and empower *Charles V. Briggs* to execute and return this warrant.

Given under my hand this *first day of January, 1915.*

L. F. Cummings, J. P.

² *R. v. Weir*, 1 Barn. & Cres. (Eng. K. B.) 288; *Paul v. Vankirk*, 6 Binn. (Pa.) 123.

in the discharge of his official duty, and without personal interest, there is no objection to the warrant being executed by the same officer.¹

A prosecutor is not a proper person to execute a warrant, and one whose name appears upon a warrant as a prosecutor, though not named as such therein, is nevertheless a prosecutor in the case in which the warrant is issued.²

§ 62. **Delegating Authority to serve Process.** — An officer to whom process is directed may deputize another to serve the process within his presence, that is, within the sight or hearing of the superior officer who has possession of the warrant,³ but the deputized party cannot re-delegate his authority.⁴

ARREST FOR CONTEMPT

§ 63. **Contempt of Legislative Body.** — A legislative body, when acting in a judicial capacity,

¹ *Stone v. Vallee*, 18 C. C. C. (Can.) 222.

² *McCray v. State*, 134 Ga. 416, 68 S. E. 62.

³ *People v. McLean*, 68 Mich. 480, 36 N. W. 231; *Kirbie v. State*, 5 Tex. App. 60; *Ex parte McManus*, 32 N. B. R. (Can.) 481; *Bowling v. Com.*, 7 Ky. L. Rep. 821; *Com. v. Black*, 12 Pa. Co. Ct. 31; *Com. v. Field*, 13 Mass. 321; *State v. Ward*, 5 Harr. (Del.) 496. See § 60, *supra*, § 75, *infra*.

⁴ *State v. Ward*, *supra cit.*

has authority to issue a warrant for the arrest of such persons as are guilty of contempt of that body; but a sergeant-at-arms of the United States, to whom a warrant is directed, has no authority to appoint a deputy to execute that warrant outside of a place where the United States has exclusive jurisdiction.¹

§ 64. **Contempt of Court.** — When a judge, in the legitimate exercise of his jurisdiction, is defiantly disobeyed, he may commit the offender instantly to prison for contempt of court; and where a judge of a superior court, acting within his jurisdiction, commits for contempt, he is not bound in the warrant (if a warrant is made out) to set forth particularly the ground of the commitment.²

If the contempt is in the face of the court no warrant is necessary; an order is sufficient.³ But where a magistrate orally ordered the arrest of one who had committed an offense before him on a previous occasion and was allowed to depart, such arrest was held illegal.⁴

¹ *Sanborn v. Carleton*, 15 Gray (Mass.) 399.

² 15 Eng. Rul. Cases 1.

³ *Holcomb v. Cornish*, 8 Conn. 374.

⁴ *Powell v. Williamson*, 1 U. C. Q. B. (Can.) 154.

If a justice of the peace has power to commit for contempt, it must be by a warrant in writing, for a time certain;¹ but a judge of a superior court may commit for an uncertain time.

¹ *R. v. James*, 5 Barn. & Ald. (Eng. K. B.) 894.

CHAPTER IV

WHAT CONSTITUTES AN ARREST¹

§ 65. **Definition.** — To arrest is to deprive a person of his liberty by legal authority. It is the seizing a person and detaining him in the custody of the law.²

§ 66. **Requisites of a Legal Arrest.** — To constitute a legal arrest it is necessary that the arresting party have lawful authority,³ and exercise that authority in a lawful place, and at a lawful time, and that the arrested party be not exempt from arrest.

To complete an arrest there must be a taking into custody, either by touching the defendant

¹ See also "False Imprisonment," § 281, *et seq.*

² Bouvier's Law Dict. (Arrest). *Montgomery County v. Robinson*, 85 Ill. 174, quoting Bouvier's Law Dict. "Apprehension" is more properly used in criminal cases; "arrest" in civil cases; *Hogan v. Stophlet*, 179 Ill. 150, 53 N. E. 604; *B. & O. R. Co. v. Strube*, 111 Md. 119, 73 Atl. 697.

³ *Davis v. Sanders*, 133 Ala. 275, 32 So. 499; *Wells v. Johnston*, 52 La. Ann. 713, 27 So. 185.

for the purpose of arresting him, which purpose must be brought to the knowledge of the defendant,¹ or by his submission to words of arrest with the knowledge that he is being arrested.² But it is not necessary specifically to tell the person arrested that he is under arrest.³

§ 67. **Reading Warrant is not Sufficient.** — Merely reading the warrant to the accused does not make an arrest.⁴ But where an officer went to the accused with a warrant, and finding her sick in bed, read it to her, and told her that if she did not give a bond he “would haul her to jail,” it was held that there was an arrest, although he did not touch her or exercise any physical control over her.⁵

And where an officer told the accused that he had a warrant for his arrest, and thereupon the accused said he would go with him, which he did, there was an arrest.⁶

¹ *People v. Coughlin*, 13 Utah 58, 44 Pac. 94.

² *Steenerson v. Polk Co. Com'rs*, 68 Minn. 509, 71 N. W. 687.

³ *Zimmer v. State*, 64 Tex. Cr. App. 114, 141 S. W. 781.

⁴ *Baldwin v. Murphy*, 82 Ill. 485; *George v. Radford*, 3 C. & P. (Eng. N. P.) 464.

⁵ *Shannon v. Jones*, 76 Tex. 141, 13 S. W. 477.

⁶ *Aldrich v. Humphrey*, 34 C. L. J. (Can.) 385.

§ 68. **Importance of Consummation of the Arrest.** — The completion of the acts which constitute an arrest becomes very important in certain cases, for until this act of taking into custody is consummated, there can be neither a criminal rescue of the prisoner, nor a criminal escape by him. And an action of false imprisonment will not lie against the arresting party until all the acts necessary to a legal arrest have been consummated.

In an action for false imprisonment the following facts appeared: An officer having a warrant for the arrest of the plaintiff and two of his sons, met the plaintiff and one of his sons in a wagon. The officer said: "I have a warrant for you and your two sons." The plaintiff asked: "What for?" The officer replied: "For stealing pumpkins." The plaintiff started to get out of the wagon, when the officer said: "You can go home and get your horses put up and take your tea, and come down." The plaintiff went home, and with his two sons went to the house of the officer, and called out: "Here's your prisoners."

The officer said: "You move on and I will overtake you." They went on. The officer overtook them as they got to the house of the

justice, and they went in together. *Held*, that the evidence showed an arrest of the plaintiff.¹

But where an officer went to the house of the plaintiff in an action for malicious arrest, and told him that he had a writ against him but did not enter the house or touch him but left him on his promise to give bail next day, which he did, it was held that an arrest was not shown.²

Where A. and B. had a dispute and A. called a policeman who said to A. "Is this the man?" and then said to B. "You will have to come along with me to the police station," and no other words were used and no resistance offered, but B. accompanied the officer to the station and talked the matter over with the chief, and no information was laid and B. was not further detained, although the officer disclaimed an arrest there was held to be an arrest, the court ruling that if an officer, known to be such, took charge of a man, and the man reasonably thought he was under arrest from the conduct of the officer, this is an arrest as a matter of law.³

If an officer, in the discharge of his duty, in good faith invites a person to the police station

¹ *Searles v. Viets*, 2 Thomp. & C. (N. Y.) 224.

² *Perrin v. Joyce*, 3 U. C. O. S. (Can.) 300.

³ *Forsyth v. Goden*, 32 C. L. J. (Can.) 288.

for the purpose of interrogating him and investigating a charge, with a view of deciding upon future action, and without any intention at that time of putting him under arrest or restraint, doing no act constituting an arrest, and the person accompany him, no arrest has been made. In order to constitute an arrest, where no force or violence is actually used, the circumstances attending the arrest must be such as to warrant the apprehension that force will be used if there be no submission to the restraint under it.¹

An accused person who is taken by an officer in a conveyance to the scene of the homicide he is charged with, is under arrest whether he is told so or not.²

§ 69. Touching the Accused is not Necessary.

— In making an arrest it is not necessary that the party making the arrest shall even touch the person of the arrested party, but it is enough if the arrested party is in the power of the party making the arrest, and submits to the arrest,³

¹ Gunderson v. Struebing, 125 Wis. 173, 104 N. W. 149.

² Zimmer v. State, 64 Tex. Cr. App. 114, 141 S. W. 781.

³ Mowry v. Chase, 100 Mass. 79; Gold v. Bissell, 1 Wend. (N. Y.) 210; Ahern v. Collins, 39 Mo. 145;

with the knowledge that he is being arrested¹; or even if he is taken into complete custody without submission, but with knowledge that he is being arrested.

§ 70. **Understanding of the Parties is Important.** — In construing the acts relied upon to establish the arrest, the intent and understanding of the parties become very important; and whether the parties understood the acts to amount to an arrest is a question of fact for the jury.²

§ 71. **Complete Control is Sufficient.** — If an officer assumes control over the person of the defendant, as where when in a room with the accused he locks the door, and tells him that he is a prisoner, there no submission or touching is

Alderich v. Humphrey, 29 O. R. (Can.) 427; *Warner v. Riddiford*, 4 C. B. N. S. (Eng.) 180; *Searles v. Viets*, 2 *Thomp. & C.* (N. Y.) 224; *Tracy v. Seamans*, 7 N. Y. St. Rep'r 144; *Journey v. Sharpe*, 49 N. C. 165; *Brushaber v. Stegemann*, 22 Mich. 266; *Shannon v. Jones*, 76 Tex. 141, 13 S. W. 477; *Courtroy v. Dozier*, 20 Ga. 369; *Field v. Ireland*, 21 Ala. 240; *McCracken v. Ansley*, 4 Strob. (S. C.) 1; *McAleer v. Good*, 216 Pa. 473, 65 Atl. 934.

¹ *Jones v. Jones*, 13 Ired. (N. C.) 448.

² *Jones v. Jones*, 13 Ired. (N. C.) 448. Putting one out of the house is not an arrest; *Huffman v. State*, 95 Ga. 469, 20 S. E. 216.

necessary, for the defendant has been completely taken into the custody of the law.¹

§ 72. **Avoiding Custody by Accepting Alternative.** — Where the accused, to avoid being taken into custody, accepts an alternative which is offered him by the arresting party, there the arrest is complete, although no physical control is exercised. As where an officer came to the room of the party whose arrest was sought, and finding him ill in bed, told him that unless he deliver a certain article or find bail, he must either take him or leave a man with him, and the party complied with his order, it was held a sufficient arrest.²

But where an officer stated to the defendant that he had a *capias* for him, and the defendant asked for a couple of days to procure a bond, to which the officer assented, and upon receiving the bond two days later, indorsed the arrest on the *capias* as of that date, it was held that there was no arrest prior to giving the bond.³

¹ Williams v. Jones, Cas. temp. Hard. (Eng. K. B.) 298; Petit v. Colmery, 4 Penn. (Del.) 266, 55 Atl. 344; State v. Deatherage, 35 Wash. 326, 77 Pac. 504.

² Grainger v. Hill, 4 Bing. N. C. (Eng. C. P.) 212.

³ McCracken v. Ansley, 4 Strob. (S. C.) 1.

§ 73. **Bare Words not Sufficient to Arrest.** — Bare words alone will not make an arrest, if the defendant resists the arrest.¹ In such case there must be an actual touching of the person of the defendant in order that the arrest be effective,² and in all cases there must be a restraint of the person, — a taking into custody.³

So where a salesman, upon suspicion that a person had stolen goods from his employer's store, touched the suspected person on the shoulder and *requested* her to return to the store, which she did, it was held there was no arrest, there being no restraint or compulsion exercised.⁴

And where an officer had a warrant against the accused, and went upon his premises, saying, "I arrest you," the accused with a fork in his hand prevented the officer touching him, and retreated from the officer's presence, it was held not to be an arrest, because there was no submission or restraint.⁵

¹ *Searles v. Viets*, 2 Thomp. & C. (N. Y.) 224; *Hill v. Taylor*, 50 Mich. 549, 15 N. W. 899; *Conoly v. State*, 2 Tex. App. 412; *Russen v. Lucas*, 1 C. & P. (Eng. N. P.) 153.

² *Genner v. Sparks*, 1 Salk. (Eng. K. B.) 79.

³ *French v. Bancroft*, 1 Metc. (Mass.) 502; *Kernan v. State*, 11 Ind. 471; *Goodell v. Tower*, 77 Vt. 61, 58 Atl. 790.

⁴ *Hershey v. O'Neill*, 36 Fed. (U. S.) 168.

⁵ *Genner v. Sparks*, 1 Salk. (Eng. K. B.) 79.

§ 74. **Touching consummates Arrest, though Accused takes Immediate Flight.** — An officer effects an arrest of a person whom he has authority to arrest, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him.¹

§ 75. **Arresting Hand may be of Officer's Assistant.** — **Presence.** — And it is not necessary that the arresting hand be the officer's own hand, but may be that of an assistant, even though the officer is not actually in sight; yet when an arrest is made by his assistant or follower, the officer ought to be so near as to be considered as acting in it,² and in case of a misdemeanor must have the warrant with him.³

A private person who is a member of a sheriff's posse may make an arrest, though the sheriff is at a considerable distance away, provided he is within the county proceeding about the business of the arrest, because he is then constructively present.⁴

And the question in these cases does not turn

¹ *Whitehead v. Keyes*, 3 Allen (Mass.) 495; U. S. v. *Benner*, Bald. (U. S. C. C.) 239.

² *Emery v. Chesley*, 18 N. H. 198; *Whitehead v. Keyes*, *supra cit.*; *Ex parte McManus*, 32 N. B. R. (Can.) 481.

³ *Ex parte McManus*, 32 N. B. R. (Can.) 481.

⁴ *Robinson v. State*, 93 Ga. 77, 18 S. E. 1018.

on the fact of distance, so long as the officer is within his territory, and is *bona fide* and strictly engaged in the business of the arrest. So where an officer having a warrant to apprehend several persons who had riotously assembled and when in endeavoring to serve his process he was resisted, and, being unable to make the arrest, commanded several persons to assist him and guard the house while he went to the next town, about four miles distant, to get a sufficient force to enable him to execute the warrant, it was held that the officer was *constructively* present, and that during his temporary absence for the purpose of getting further assistance, those whom he had commanded to assist him, and who by that command were bound to assist him, were liable to punishment for permitting or assisting the offenders to escape.¹

§ 76. **Time of Arrest. — Sunday.** — A person may be apprehended on a criminal charge at any time, in the night as well as in the day,² and it

¹ *Coyles v. Hurin*, 10 Johns. (N. Y.) 85.

² *Mackalley's Case*, 9 Coke (Eng. K. B.) 66; *Williams v. State*, 44 Ala. 41. Respecting arrest after sunset in civil cases, the Massachusetts statute provides, "An arrest shall not be made after sunset, in cases in which a certificate of a magistrate is required,

lies within the officer's discretion to choose the night instead of the day for the purpose of making an arrest.¹ Though the common law prohibits arrests on Sunday, it excepts the cases of treason, felony, and breach of the peace.² "Breach of the peace" is held to include all indictable offenses,³ therefore the common law only prohibited arrests in civil cases on Sunday.

§ 77. **Place of Arrest. — Court. — Clergy. —** Respecting the place of arrest, it may be said that no place affords protection to offenders against the criminal law. And an officer armed with a warrant for the arrest of a railroad engineer may lawfully stop a train run by him for that purpose.⁴ Yet to preserve order and decorum, an arrest could not be made in open court, but should be made after the adjournment of court, unless it is specially authorized therein for cause." Rev. Laws of Mass. c. 168, § 27.

¹ Wright v. Keith, 24 Me. 163.

² By Stat. 29 Car. II. c. 7, § 6, "No person upon the Lord's day shall serve or execute, or cause to be served or executed, any writ, process, warrant, order, judgment, or decree, except in cases of treason, felony, or breach of the peace."

³ Rawlins v. Ellis, 16 M. & W. (Eng. Exch.) 172; Keith v. Tuttle, 28 Me. 326; *Ex parte Levi*, 28 Fed. (U. S.) 651.

⁴ St. J. & L. C. R. Co. v. Hunt, 60 Vt. 588, 15 Atl. 186.

or outside the court-room. And even the clergy may, on a criminal charge, be arrested while in their churches,¹ though it is illegal to arrest them in any civil case while in the church to perform divine service, or going to or returning from the same, on any day.²

Without a warrant an arrest can be made only in the State wherein the offense was committed.³

§ 78. Officer must make known his Authority.

— A person about to be arrested is entitled to know that he is arrested by lawful authority,⁴ and after being apprised of the lawful authority, if he submits to the arrest,⁵ he has a right to know the

¹ *Pit v. Webley*, Cro. Jac. 321; *State v. Dooley*, 121 Mo. 591, 26 S. W. 558; *Ledbetter v. State*, 23 Tex. App. 247, 5 S. W. 226.

² *Bacon's Abr. Trespass* 23.

³ *State v. Shelton*, 79 N. C. 605; *Tarvers v. State*, 90 Tenn. 485, 16 S. W. 1041; *Malcolmson v. Gibbons*, 56 Mich. 459, 23 N. W. 166. *Contrd*: *State v. Anderson*, 1 Hill (S. C.) 327.

⁴ *State v. Phinney*, 42 Me. 384; *Com. v. Weathers*, 7 Kulp (Pa.) 1; *Kindred v. Stitt*, 51 Ill. 401; *State v. Miller*, 7 Ohio N. P. 458. The arresting officer must make himself known as such; *State v. Rogers*, — N. C. —, 81 S. E. 999.

⁵ *State v. Townsend*, 5 Harr. (Del.) 487; *Lewis v. State*, 3 Head (Tenn.) 127; *Arnold v. Steeves*, 10 Wend. (N. Y.) 514; *State v. Curtis*, 2 N. C. 543;

grounds on which he is arrested. But no notice of intent to arrest, and of the offense charged is necessary where the accused knows the officer as such, and is committing an offense in his presence,¹ or while the officer is in fresh pursuit.²

A person resisting arrest is not entitled to see the warrant or know its contents so long as he resists;³ and whether he resists or not, if he has actual notice of the lawful authority by which he is arrested, the officer is not obliged to show or read his warrant,⁴ unless required by statute to do so.⁵

Plasters v. State, 1 Tex. App. 673; *State v. Miller*, 7 Ohio N. P. 458; *State v. Gay*, 18 Mont. 51, 44 Pac. 411.

¹ *Roberson v. United States*, 4 Okla. Cr. App. 336; 111 Pac. 984; *People v. Governale*, 193 N. Y. 581, 86 N. E. 554.

² *People v. Governale*, *supra cit.*

³ *Com. v. Cooley*, 6 Gray (Mass.) 350; *Com. v. Hewes*, 1 Brewst. (Pa.) 348; *Tuck v. Beliles*, 153 Ky. 848, 156 S. W. 883.

⁴ *People v. Wilson*, 55 Mich. 506, 21 N. W. 905; see § 81, *infra*; *Com. v. Cooley*, *supra cit.*; *State v. Townsend*, 5 Harr. (Del.) 487; *Bellows v. Shannon*, 2 Hill (N. Y.) 86; *State v. Dula*, 100 N. C. 423, 6 S. E. 89; *People v. Moore*, 2 Doug. (Mich.) 1; *State v. Spaulding*, 34 Minn. 361, 25 N. W. 793; *Com. v. Hewes*, 1 Brewst. (Pa.) 348; *State v. Caldwell*, 2 Tyler (Vt.) 212; *U. S. v. Jailer*, 2 Abb. (U. S. C. C.) 265; *U. S. v. Rice*, 1 Hughes (U. S. C. C.) 560. *Contra*: *Steenerson v. Polk Co. Com'rs*, 68 Minn. 509, 71 N. W. 687.

⁵ In Massachusetts it is provided by statute that

§ 79. **Officer need not imperil his Precept.** — An officer is not required in any case to part with the warrant from his possession, for that is his justification.¹ Nor is he bound to exhibit it when there is reason to apprehend that it will be lost or destroyed; he must, however, in some way inform the party that he has a warrant, and comes as an officer to execute it, and not as a wrongdoer.²

But the arresting party is not obliged to show his warrant if the arrest might be lawfully made without a warrant.

§ 80. **Effect of Officer's Failure to exhibit his Authority.** — Where an arrest has been made by a

whoever is arrested by virtue of process, or whoever is taken into custody by an officer, has a right to know from the officer who arrests or claims to detain him, the true ground on which the arrest is made; and an officer who refuses to answer a question relative to the reason for such arrest, or answers such question untruly, or assigns to the person arrested an untrue reason for the arrest, or neglects upon request, to exhibit to the person arrested, or to any other person acting in his behalf, the precept by virtue of which such arrest has been made, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year. Rev. Laws, c. 205, § 1.

¹ State v. Phinney, 42 Me. 390.

² Bellows v. Shannon, 2 Hill (N. Y.) 86.

party not known to be an officer, and who refuses, on demand, to exhibit his precept or declare his authority, and resistance is made to such officer, and death ensues to the officer from such resistance, such killing will not be murder, but manslaughter only.¹ And it has been held that the settled rule "where a person having authority to arrest, and using the proper means for that purpose, is resisted, he can repel force with force, and if the party making the resistance is unavoidably killed, the homicide is justifiable," may be invoked by a person who resists and kills the officer, if he was ignorant of the fact that he was an officer.²

The only effect of the omission of the officer to declare his authority, or to show his warrant where it is his duty to show it, is to deprive him of the protection which the law throws around its ministers, when in the rightful discharge of their official duty.³

§ 81. **Arrest by Known Officer is Notice of Authority.** — A person is held to know that he is arrested by lawful authority when the arrest is

¹ *State v. Phinney*, 42 Me. 390.

² *Starr v. United States*, 153 U. S. 614, 14 Sup. Ct. 919, 38 L. ed. 841.

³ *State v. Phinney*, *supra cit.*

made by an officer, within his own jurisdiction, who is generally known to be an officer.¹ And this knowledge is presumed to exist when the arresting officer is in the uniform of a police officer, or when the officer exhibits the badge of his office.²

But the knowledge will not be presumed to exist unless the circumstances are such that the accused may clearly be presumed to know that the party arresting was an officer in uniform. So where the prisoner, on a dark night, was pursued by a mob which, having severely beaten him, now threatened to kill him for having wounded one of their number in a fight, and one of the pursuers, who was an officer in uniform, being in advance of the others, seizes the prisoner, and the prisoner kills him, it is a justifiable act of self-defense, unless the prisoner knew that the party who had seized him was an officer, which, on

¹ *Com. v. Cooley*, 6 Gray (Mass.) 350; *State v. Townsend*, 5 Harr. (Del.) 487; *U. S. v. Rice*, 1 Hughes (U. S. C. C.) 560; *People v. Moore*, 2 Doug. (Mich.) 1; *State v. Spaulding*, 34 Minn. 361, 25 N. W. 793; *Bellows v. Shannon*, 2 Hill (N. Y.) 86; *U. S. v. Jailer*, 2 Abb. (U. S. C. C.) 265; *State v. Caldwell*, 2 Tyler (Vt.) 212; *State v. Dula*, 100 N. C. 423, 6 S. E. 89; *Com. v. Hewes*, 1 Brewst. (Pa.) 348.

² *Yates v. People*, 32 N. Y. 509.

account of the existing darkness and other circumstances, was extremely doubtful.¹

§ 82. **One not a Known Officer must show his Warrant.** — Any one who is not a known officer acting within the limits of his jurisdiction must exhibit his warrant before making an arrest, if called upon to do so by the party whose arrest is sought, if the warrant is necessary to the arrest.² And a special officer must show his warrant *if demanded*, not otherwise.³

§ 83. **Actual Notice obviates Necessity of Reading Warrant.** — Actual notice to the arrested party, in any manner, that the arrest is by lawful authority, releases the officer from his duty to show his warrant or read it to the accused,⁴ unless the statute requires him to do so.

¹ *Yates v. People*, *supra cit.*

² *People v. Moore*, 2 Doug. (Mich.) 1; *Bates v. Com.*, 13 Ky. L. Rep. 132, 16 S. W. 528; *State v. Stancill*, 128 N. C. 606, 38 S. E. 926; *Frost v. Thomas*, 24 Wend. (N. Y.) 418; *Arnold v. Steeves*, 10 Wend. (N. Y.) 514; *State v. Dula*, 100 N. C. 423, 6 S. E. 89; *Cortez v. State*, 44 Tex. Cr. App. 169, 69 S. W. 536; *State v. Garrett*, 60 N. C. 144. But see *U. S. v. Rice*, 1 Hughes (U. S. C. C.) 560; *O'Halloran v. McGuirk*, 167 Fed. (U. S.) 493.

³ *State v. Dula*, *supra cit.*; *State v. Curtis*, 2 N. C. 543.

⁴ *Com. v. Cooley*, 6 Gray (Mass.) 350; *State v.*

Where a person knows the reason for his arrest, and offers resistance thereto, he thereby waives his right to have the warrant read to him.¹

§ 84. **Strangers not entitled to Notice.** — And in no case is an officer obliged to show his warrant to any person other than the party arrested, nor to him except on request,² unless the statute of the State requires it.

In Massachusetts the statute provides that an officer shall upon request exhibit to the person arrested, *or to any other person acting in his behalf*, the precept by virtue of which an arrest has been made.³

§ 85. **Notice may be Constructive.** — Notice of authority to arrest may also be presumed from the circumstances of the case; as where even a private person attempts to arrest one in the act of committing a felony, or where the offender is immediately pursued from the scene of his crime, it is sufficient notice to the party whose arrest is sought.⁴

Townsend, 5 Harr. (Del.) 487; *People v. Wilson*, 55 Mich. 506, 21 N. W. 905.

¹ *Tuck v. Beliles*, 153 Ky. 848, 156 S. W. 883

² 1 East P. C. 317; 1 Hale's P. C. 458.

³ Rev. Laws, c. 205, § 1.

⁴ *Wolf v. State*, 19 Ohio St. 248; *Shovlin v. Com.*, 106 Pa. St. 369; *People v. Pool*, 27 Cal. 572.

§ 86. **Resisting Arrest.** — It is the duty of one to submit to a legal arrest.¹ Mere resistance of legal arrest is a crime,² because it involves an assault upon the officer; and if the arresting person is killed by the accused or his friends, it is murder.³ If the resisting person is killed, it is no more than manslaughter, and may be a justifiable homicide.⁴ But a person illegally arrested may use such force as is necessary to regain his liberty, and should there be reasonable ground to believe that the officer making the arrest intends shooting the prisoner to prevent his escape, such prisoner may shoot the officer in self-defense.⁵ If, however, the person resisting illegal arrest kills merely to prevent the arrest, and not for the purpose of saving himself from serious personal injury, he is guilty of manslaughter, but not of murder.⁶

And whether the arrest be legal or not, the power of arrest may be exercised in such a wanton and menacing manner as to threaten the accused with loss of life, or some bodily harm. In such a case,

¹ *Dixon v. State*, 12 Ga. App. 17, 76 S. E. 794.

² *People v. Haley*, 48 Mich. 495, 12 N. W. 671; *State v. Belk*, 76 N. C. 10.

³ *Mockabee v. Com.*, 78 Ky. 380.

⁴ *State v. Rose*, 142 Mo. 418, 44 S. W. 329.

⁵ *Miers v. State*, 34 Tex. Cr. App. 161, 29 S. W. 1074.

⁶ *Com. v. Carey*, 12 Cush. (Mass.) 246.

though the attempted arrest was lawful, the killing would be justifiable.¹ A charge of resisting an officer cannot be sustained unless the officer resisted was authorized by law to make the arrest at the time and place where the arrest was attempted.² If the arrest was by warrant, the process must have been valid on its face, and from a court of competent jurisdiction.³ It is no defense to a charge of resisting an officer, that the person whose arrest was attempted was not guilty of the offense charged.⁴ But where the arrest of the wrong person is attempted, the arrest may be resisted.⁵

§ 87. After making Arrest. — Officer's Duty. —

It is the officer's duty, upon making an arrest, to keep the prisoner within his custody until he is

¹ *Jones v. State*, 26 Tex. App. 1, 9 S. W. 53; *State v. Dennis*, 2 Marv. (Del.) 433, 43 Atl. 261.

² *Cantrill v. People*, 3 Gil. (Ill.) 357; *State v. Estis*, 70 Mo. 427; *State v. Hooker*, 17 Vt. 658.

³ *State v. Leach*, 7 Conn. 452; *Housh v. People*, 75 Ill. 491; *State v. Beebe*, 13 Kan. 589; *People v. Ah Teung*, 92 Cal. 421, 28 Pac. 577; *State v. Jones*, 78 N. C. 420.

⁴ *Com. v. Tracey*, 5 Mete. (Mass.) 552; *State v. Garrett*, 80 Iowa 590, 46 N. W. 748.

⁵ *Wentworth v. People*, 4 Scam. (Ill.) 555; *State v. Freeman*, 8 Iowa 428.

lawfully committed, discharged, or admitted to bail by order of the court.¹

ESCAPE

§ 88. **Definition.** — Escape is departure of a prisoner from custody before he is discharged by due process of law.²

§ 89. **Liability of Officer.** — Should the officer, by his willingness or negligence, allow the prisoner to escape from his custody, he is liable.³ It is not conclusive evidence of negligence against the officer that he did not handcuff his prisoner.⁴

If the escape is voluntary, and the prisoner is guilty of felony, the escape is a felony on the part of the officer.⁵ But an escape of one confined in the county jail on a charge of misde-

¹ *Com. v. Morihan*, 4 Allen (Mass.) 585.

² *Bouvier's Law Diet.* (Escape); *Com. v. Farrell*, 5 Allen (Mass.) 130; *State v. Davis*, 14 Nev. 446; *Butler v. Washburn*, 25 N. H. 251; *Randall v. State*, 53 N. J. L. 488, 22 Atl. 46; *Ex parte Clifford*, 29 Ind. 106; *State v. Brown*, 82 N. C. 585.

³ *State v. Ritchie*, 107 N. C. 857, 12 S. E. 251; *Garver v. Terr.*, 5 Okla. 342, 49 Pac. 470; *Shattuck v. State*, 51 Miss. 575.

⁴ *State v. Hunter*, 94 N. C. 829.

⁵ 2 Hawkins' P. C. c. 19, § 25; *Ex parte De Vore*, — N. M. —, 136 Pac. 47.

meanor is a misdemeanor,¹ unless he is unlawfully released therefrom by the court or sheriff, in which case it is no crime.² If the escape is merely by the officer's negligence, it is only a misdemeanor in any case.

The only excuse that an officer can set up, when answering for the escape of a prisoner, is that it was by act of God, or the enemies of the country,³ that is, the members of a nation at war with our country. And in an escape the triviality of the offense with which a person is charged is not a measure of the offense of the officer permitting the escape.⁴ But an officer is not criminally responsible for an escape by reason of the negligence of an assistant, if he used due care in selecting and appointing the assistant.⁵

If an officer makes an arrest, and has the prisoner admitted to bail in the same county, on an indorsed warrant issued in another county, he is guilty of a voluntary escape. In such case it is the officer's duty to retake the prisoner, and he may do so on the same warrant.⁶

¹ *Foster v. State*, 8 Okla. Cr. 718, 130 Pac. 310.

² *Ex parte Eley*, 9 Okla. Cr. App. 76, 130 Pac. 821.

³ *Fairchild v. Case*, 24 Wend. (N. Y.) 383.

⁴ *Com. v. Shields*, 50 Pa. Super. Ct. 194.

⁵ *State v. Lewis*, 113 N. C. 622, 18 S. E. 69.

⁶ *Clark v. Cleveland*, 6 Hill (N. Y.) 344.

And where a constable arrested the defendant on a warrant issued by a justice of the peace, and left him on his promise to follow him, and the accused was later arrested by a deputy sheriff, and taken to jail on a criminal process, so that the constable could not take him before the justice of the peace on the warrant, it was held that by the constable leaving his prisoner, after effecting the arrest, there was a voluntary escape, and the officer, being unable to retake him, was held liable for the escape.¹

There can be no escape from custody where the arrest was made by a void warrant,² or where the act of taking into custody did not in itself amount to an arrest.

An officer may arrest with or without warrant³ one who has escaped from custody either before or after trial and commitment,⁴ and it is immaterial whether the offense originally charged was a crime

¹ *Olmstead v. Raymond*, 6 Johns. (N. Y.) 62.

² *Housh v. People*, 75 Ill. 487; *Hitchcock v. Baker*, 2 Allen (Mass.) 431.

³ *Com. v. Sheriff*, 1 Grant (Pa.) 187; *Floyd v. State*, 79 Ala. 39; *Clark v. Cleveland*, 6 Hill (N. Y.) 344; *State v. Wamire*, 16 Ind. 357; *Hollon v. Hopkins*, 21 Kan. 638. But see *Doyle v. Russell*, 30 Barb. (N. Y.) 300.

⁴ *McQueen v. State*, 130 Ala. 136, 30 So. 414.

or misdemeanor, or whether the person escaping was guilty or innocent of the offense charged, because an unlawful departure from legal custody is always a criminal offense.¹ If an officer makes an illegal arrest, and then accepts a bribe from his prisoner to allow him to escape, he is guilty of bribery notwithstanding the arrest was illegal.²

¹ *Com. v. Miller*, 2 Ashm. (Pa.) 68; *Holland v. State*, 60 Miss. 939; *State v. Bates*, 23 Iowa 96.

² *Mosely v. State*, 25 Tex. App. 515, 8 S. W. 652.

CHAPTER V

ARREST WITH WARRANT

§ 90. **Name of Arrested Party must appear in Warrant.** — A warrant will not justify the arrest of one not named therein, by reason of the fact that the name used was supposed to be his.¹

§ 91. **Valid Warrant protects Officer.** — If a warrant is lawful and regular on its face, disclosing no want of jurisdiction or other irregularity, and the magistrate issuing it has lawful authority to do so, the warrant is a complete protection to the officer who makes the arrest.² And a valid warrant protects an officer even though it be known that it was procured by fraud.³

§ 92. **Invalid Warrant is no Protection.** — **Taking Life.** — If a warrant is not valid on its

¹ West v. Cabell, 153 U. S. 78, 14 Sup. Ct. 752, 38 L. ed. 643.

² Clark v. May, 2 Gray (Mass.) 410; Wright v. Keith, 24 Me. 158; Housh v. People, 75 Ill. 491; State v. James, 80 N. C. 370; Mangold v. Thorpe, 33 N. J. L. 134. See § 30, *supra*.

³ Wilmarth v. Burt, 7 Mete. (Mass.) 257.

face, or if the whole subject-matter is without the jurisdiction of the magistrate, the officer is really acting without any warrant at all, and thereby becomes a trespasser, if a private person under the same circumstances would be a trespasser. It is held by some authorities that the officer's life may be taken, if necessary, in resisting such unlawful arrest,¹ while other decisions hold that in case of an attempted illegal arrest by a known officer, it is not lawful to take life in resisting the arrest, and that if a person kills a known officer to prevent him making an illegal arrest, he is guilty of manslaughter at least,² and may be guilty of murder if the killing was prompted by personal malice against the officer.³ If an officer kills in the act of serving void process, he is guilty of murder. And here it may be noted that throughout the law of arrest, the *necessity* of the case, when human life is to be taken, is of paramount importance, for nothing short of the sternest necessity will justify the act.

A party cannot reasonably apprehend any serious consequences to himself by submission to an illegal arrest by a known officer, beyond a tem-

¹ *Com. v. Crotty*, 10 Allen (Mass.) 403.

² *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458.

³ *Rafferty v. People*, 72 Ill. 37.

porary invasion of his right of personal liberty, and the law does not sanction the taking of life to repel every threatened trespass, or invasion of personal rights.¹

§ 93. **When a Warrant is Void.** — A warrant is void if it has no seal,² when a seal is required by statute, or if it is not supported by sufficient oath or affirmation and that fact appear on its face,³ or if it does not sufficiently describe the person to be arrested, so that from the description he may be identified;⁴ as where a warrant is issued against "John Doe or Richard Roe, whose other or true name is to your complainant unknown," with no other description or means of identification, the warrant is absolutely void and may be resisted with all *necessary* force.⁵

But an arrest is justified under a defective warrant if no warrant is necessary to the arrest.⁶

§ 94. **Rights of Strangers to Interfere.** — As a general rule, if the warrant be materially defec-

¹ *Com. v. Drew*, 4 Mass. 391; *State v. Cantieny*, *supra cit.*; *Williams v. State*, 44 Ala. 41.

² *State v. Drake*, 36 Me. 366. *Contra*: *Millett v. Baker*, 42 Barb. (N. Y.) 215. See § 50, *supra*.

³ *Grumon v. Raymond*, 1 Conn. 40.

⁴ *Com. v. Crotty*, 10 Allen (Mass.) 403.

⁵ *Com. v. Crotty*, *supra cit.*

⁶ *R. v. Sabeans*, 7 C. C. C. (Can.) 498.

tive, or the officer exceeds his authority in executing it, any third person may lawfully interfere to prevent an arrest under it, doing no more than is actually necessary for that purpose.¹ But in case of a lawful arrest an officer may defend himself from the attack of a third person without notifying him of the cause of the arrest.²

§ 95. **Liability of Officer's Assistant.** — If the officer is liable as a trespasser, especially in the service of civil process, the assistant of such officer may also be liable in trespass.³

§ 96. **Taking Prisoner before a Magistrate.** — The disposing of the prisoner becomes a very important matter after the consummation of a legal arrest, for if the disposition be not according to law, and as directed in the warrant,⁴ the officer will render himself liable for the abuse of his process. The first duty after making the arrest is to bring the prisoner with all reasonable speed⁵ before a magistrate for examination,⁶

¹ *Com. v. Crotty*, 10 Allen (Mass.) 403; *R. v. Osmer*, 5 East (Eng. K. B.) 304.

² *Ringhand v. Grannan*, 31 Ohio C. C. 587.

³ *Darling v. Kelley*, 113 Mass. 29.

⁴ 2 Hale's P. C. 119; *Pratt v. Hill*, 16 Barb. (N. Y.) 303.

⁵ *Green v. Kennedy*, 46 Barb. (N. Y.) 16; *Cary v. State*, 76 Ala. 78; *Habersham v. State*, 56 Ga. 61.

⁶ *Brock v. Stimson*, 108 Mass. 520; *Ocean Steam-*

but if the prisoner is physically incapacitated to be so brought, or if from other circumstances an immediate hearing is impossible,¹ the officer may delay until the incapacity disappears, but no longer.

The warrant need not state the time when the party is to be brought before the magistrate for the examination,² but it being the duty of every person who makes an arrest, whether he be an officer or a private party, to bring the prisoner before the proper magistrate without delay, a failure of the arresting party to do so promptly

ship Co. v. Williams, 69 Ga. 251; Twilley v. Perkins, 77 Md. 252, 26 Atl. 286; Pastor v. Regan, 62 N. Y. St. Rep'r 204, 30 N. Y. S. 657; Judson v. Reardon, 16 Minn. 431; Cary v. State, 76 Ala. 78; Simmons v. Vandyke, 138 Ind. 380, 37 N. E. 973; State v. Freeman, 86 N. C. 683; Muscoe v. Com., 86 Va. 443, 10 S. E. 534; Missouri, etc. R. Co. v. Warner, 19 Tex. Civ. App. 463, 49 S. W. 254; Ashley v. Dundas, 5 U. C. Q. B. o. s. (Can.) 749; Rutledge v. Rowland, 161 Ala. 114, 49 So. 461; Moses v. State, 6 Ga. App. 251, 64 S. E. 699.

¹ Rohan v. Sawin, 5 Cush. (Mass.) 281; Wiggins v. Norton, 83 Ga. 148, 9 S. E. 607; State v. Freeman, 86 N. C. 683; Hutchinson v. Sangster, 4 Greene (Iowa) 340; Scirele v. Neeves, 47 Ind. 289; King v. State, 6 Ga. App. 332, 64 S. E. 1001.

² Mayhew v. Parker, 8 T. R. (Durnf. & E. Eng. K. B.) 110.

will make him guilty of false imprisonment.¹ Intoxication of the prisoner, for example, will excuse delay in this respect so long as the intoxication exists.² The duty to present the prisoner for examination is the same whether the arrest be with or without a warrant.

§ 97. **Officer's Right to release Prisoner.** — By the common law, an officer may make an arrest for felony upon reasonable grounds of suspicion, without a warrant, and if his suspicions vanish, he may discharge the prisoner without bringing him before a magistrate.³ But this provision of the common law does not authorize the officer to detain the prisoner for the purpose of verifying his suspicions.⁴

§ 98. **Officer's Right to detain Prisoner.** — When an officer under a warrant from a county

¹ *Porter v. Swindle*, 77 Ga. 419, 3 S. E. 94; *Burke v. Bell*, 36 Me. 317; *Keefe v. Hart*, 213 Mass. 482, 100 N. E. 558; *Cheng Fun v. Campbell*, 16 C. C. C. (Can.) 508.

² *Arneson v. Thorstad*, 72 Iowa 145, 33 N. W. 607; *Wiltse v. Holt*, 95 Ind. 469; *Scirele v. Neeves*, 47 Ind. 289; *State v. Freeman*, 86 N. C. 683; *Hutchinson v. Sangster*, 4 Greene (Iowa) 340.

³ *McCloughan v. Clayton*, 1 Holt (Eng. C. -P.) 478; *Burke v. Bell*, *supra cit.*

⁴ *Burke v. Bell*, *supra cit.*

court, commanding him to arrest the respondent, and have him brought before that court forthwith, arrests the respondent, brings him to the place of holding such court, but finds the court not in session, he may detain the respondent a reasonable time until he can ascertain whether it is possible to deliver him into court, and may lodge him in jail in the meantime for safe-keeping.¹

§ 99. **Impossibility as a Defense.** — It sometimes happens that it becomes impossible for an officer to perform a duty which the law has commanded him to do, but the impossibility is a good defense to an indictment for not performing the duty.²

If, for example, an officer has been commanded to deliver a prisoner to a certain official, or to have him at a certain place, and the official or the place has ceased to exist, the officer is excused from the performance of the command of the law, and would be justified in confining his prisoner in a suitable place until further order could be procured from the court for the disposition of the prisoner.

§ 100. **The Place of Confinement.** — Even a freight car is not, as a matter of law, an unsuit-

¹ *Kent v. Miles*, 65 Vt. 582, 27 Atl. 194.

² *Tate v. State*, 5 Blackf. (Ind.) 73.

able place for confining a prisoner.¹ But it might be, as a matter of fact for a jury to consider, as, for example, if the freight car should expose the prisoner to the inclemency of the weather, or otherwise endanger his health. So where an officer arrested one upon a charge of drunkenness, and confined him in the city guard-house, where during the night the prisoner died, the jury finding that his death was "accelerated by the noxious air of the guard-house," the city was held liable for thus improperly confining the prisoner.²

An officer being responsible for the safety of his prisoner, the place of confinement is left largely to his discretion. And it was held that a United States marshal was justified in confining his prisoner in the State Penitentiary instead of the county jail, when, in his opinion, the safety and security of the prisoner required it.³

§ 101. **Exercise of Officer's own Judgment.** — The question of what constitutes reasonable necessity very frequently arises in matters pertaining to the law of arrest. And it may be said that whenever an officer is called upon to exer-

¹ *Arneson v. Thorstad*, 72 Iowa 145, 33 N. W. 607.

² *Lewis v. City of Raleigh*, 77 N. C. 229.

³ *Clinton v. Nelson*, 2 Utah 284.

cise his own judgment, in any matter, the law not instructing him as to the course which he shall pursue, he is not liable if he does that, which, considering all the circumstances of the case, any other man of fair average intelligence would do under similar circumstances. That is, he is not required to exercise the highest grade of judgment, but he must not fall below that which is expected from the man of a fair average intellect.

And any act or omission of an officer which arises from the necessity of the case, will justify the officer in acting or not acting only so long as the necessity exists.¹

§ 102. **Prisoner may waive Right to be taken before a Magistrate.** — When the statute provides that the person arrested be brought before a magistrate, the officer is liable for false arrest if he discharges the prisoner without bringing him before a magistrate, unless there is an express waiver by the prisoner of his right to be taken before a magistrate.²

¹ *Tubbs v. Tukey*, 3 Cush. (Mass.) 438.

² *Brook v. Stimson*, 108 Mass. 520; *Phillips v. Fadden*, 125 Mass. 198; *Caffrey v. Drugan*, 144 Mass. 294, 11 N. E. 96; *Keefe v. Hart*, 213 Mass. 476, 100 N. E. 558.

As where an officer arrested the accused for intoxication, between one and two o'clock in the morning, on a Sunday, and detained him until between seven and eight o'clock in the afternoon of the next day, when it was found that the trial justice was detained out of town by reason of an unusual freshet which had rendered travelling unsafe. These facts were communicated to the accused, and upon his own request he was released from custody. *Held*, that an action for false imprisonment did not lie.¹

When, however, the arrest is by warrant, the duty of the officer to take the prisoner before a magistrate is an absolute duty; therefore the prisoner may not then waive his right to be taken before the magistrate, and nothing except impossibility will excuse the officer from obeying the command of the law.

§ 103. **Taking Prisoner before Prosecuting Attorney.** — A State's counsel has no right to have an arrested person brought from the place of arrest to his office unless the prisoner desires a conference.²

¹ *Caffrey v. Drugan*, 144 Mass. 294, 11 N. E. 96.

² *State v. Thavanot*, 225 Mo. 545, 125 S. W. 473.

CIVIL ARREST¹

§ 104. **Constitutional Prohibitions. — Fraud. —** Imprisonment for debt arising out of contract is generally prohibited by constitutional provisions;² but these provisions do not apply where fraud is a factor in the charge.³ And the fraud charged must relate to procuring the contract to be made, or in attempting to evade performance.⁴

Constitutional or statutory abolishments of imprisonment for debt do not apply to tort actions,⁵ although the right to arrest in tort actions is extensively regulated by the statutes of the several States. Nor do they apply to arrest for the non-payment of taxes.⁶

§ 105. **Statutes must be Strictly Followed. —** A statute authorizing an arrest on civil process must be so strictly construed that process will

¹ Refer to index for other matters pertaining to this subject.

² Act of Congress, Feb. 28, 1839.

³ *Appleton v. Hopkins*, 5 Gray (Mass.) 530.

⁴ *In re Tyson*, 32 Mich. 262.

⁵ *McDuffie v. Beddoe*, 7 Hill (N. Y.) 578; *U. S. v. Banister*, 70 Fed. (U. S.) 44; *Sedgebeer v. Moore*, *Brightley* (Pa.) 197.

⁶ *Appleton v. Hopkins*, *supra cit.*

only issue in cases that are clearly within the statute,¹ and all the proceedings in the arrest must strictly follow the statutory provisions.

An officer who arrests a defendant in a civil proceeding, on a void warrant, outside his jurisdiction, cannot rearrest him. And the party appearing in court pursuant to such void warrant does not waive his right to object to the jurisdiction of the court.²

The validity of an arrest in a civil action does not depend on the sufficiency of the plaintiff's cause of action, but on the jurisdiction of the court to summon the alleged debtor to answer and give security for such final judgment as may be recovered.³ A recognizance entered into after an illegal arrest, is invalid, and the invalidity is not waived by the application to take the oath for the relief of poor debtors.⁴

§ 106. **Debtor about to leave State.** — Where the statute provides for the arrest of a debtor who is about to leave the State with intent to

¹ *Merritt v. Openheim*, 9 La. Ann. 54; *Hathaway v. Johnson*, 55 N. Y. 93.

² *Town of Hampden v. Collins*, 85 Conn. 327, 82 Atl. 636.

³ *Ex parte Morton*, 196 Mass. 21, 81 N. E. 869.

⁴ *Mann v. Cook*, 195 Mass. 440, 81 N. E. 286.

avoid the payment of his debts, he is not subject to such arrest if he leaves for a temporary absence only,¹ or if he leaves sufficient property within the State for the payment of the particular debt for which he is arrested, although he does not leave sufficient property for the payment of all his debts,² or if he leaves the State for the *bona fide* purpose of seeking employment elsewhere, or improving his condition.³

A non-resident voluntarily coming to a State is subject to the laws of that State even for the collection of debts, and not only could a valid service be made upon him, but he could be arrested and held to bail in accordance with the laws of the jurisdiction in which he was temporarily.⁴

§ 107. **Must be a Fraudulent Intent.** — To justify the arrest, an intent to defraud must be proved.⁵ A fraudulent intent also must be proved where an arrest is under a statute authorizing

¹ Myall v. Wright, 2 Bush (Ky.) 130.

² Carraby v. Davis, 6 Mart. N. S. (La.) 163.

³ Stevenson v. Smith, 28 N. H. 12.

⁴ Paine v. Kelley, 197 Mass. 22, 83 N. E. 8.

⁵ Tramblay v. Graham, 7 Montreal Super. Ct. (Can.) 374; Devries v. Summit, 86 N. C. 126; Hudson's Case, 2 Mart. (La.) 172.

an arrest for the fraudulent concealment of property from a creditor. Therefore, one who wears his watch and carries his money with him in his usual manner is not guilty of the fraudulent intent which is essential to the maintenance of the action.¹

§ 108. **Affidavit required by Statute.** — The usual statutory provisions relating to the application for the writ or warrant for a civil arrest require that an affidavit be filed setting forth the facts constituting the cause for arrest, and this affidavit cannot be amended by statements absolutely essential as a prerequisite to the right to arrest.²

But resort may be had to a verified complaint to cure insufficiency of affidavit to state ground for arrest.³

In New York where the statute permits arrest on affidavit of plaintiff, or other person, the complaint need not be verified.⁴

This affidavit must state that the affiant believes and has reason to believe that the defendant

¹ *Clement v. Dudley*, 42 N. H. 367.

² *Farrow v. Dutcher*, 19 R. I. 715, 36 Atl. 839.

³ *Ex parte Boyd*, — Nev. —, 134 Pac. 455.

⁴ *Voorhees Rubber Mfg Co. v. McEwen*, 111 N. Y. App. Div. 541, 97 N. Y. S. 942.

has property not exempt from execution which he does not intend to apply to plaintiff's claim.¹

If the arrest is to be made because the defendant is about to leave the State, the affidavit must not only state that the defendant is about to leave the State, but must also aver that the affiant believes that the debtor is leaving with intent to defraud his creditors, after which probable cause for entertaining the belief should be shown by setting forth the facts upon which the belief is based.²

Although on their face the proceedings may appear to be regular, the debtor who has been forcibly detained thereunder may show in an independent suit for wrongful arrest that the affidavit and certificate were in fact false.³

§ 109. **Effect of Altering Writ.** — If the writ is altered before it is served, a new affidavit is necessary or the arrest will be illegal.⁴

§ 110. **No Arrest after Attachment.** — An arrest made after an attachment of property in the same action is altogether void.⁵

¹ *Stone v. Carter*, 13 Gray (Mass.) 575.

² *Wilson v. Barnhill*, 64 N. C. 121.

³ *Paine v. Kelly*, 197 Mass. 22, 83 N. E. 8.

⁴ *Amadon v. Mann*, 3 Gray (Mass.) 467.

⁵ *Almy v. Wolcott*, 13 Mass. 76.

§ 111. **Officer's Liability for Escape.** — An officer has authority to call for assistance in making an arrest on mesne process, but he is not obliged to do so. And he is not liable for an escape that might have been prevented by his calling for aid, if the party arrested by him rescues himself or is rescued by others.¹

§ 112. **Insolvency Proceedings.** — Where a defendant has been legally arrested in a civil action, and while in custody files his voluntary petition in insolvency, he is not thereby entitled to be released from arrest.²

§ 113. **Misconduct in Professional Employment.** — Statutes may authorize the arrest of one for misconduct in professional employment,³ and whether the accused was acting in his professional capacity is a question of fact for the jury.

¹ *Whitehead v. Keyes*, 3 Allen (Mass.) 500; *Sutton v. Allison*, 2 Jones (N. C.) 341.

² *Hussey v. Danforth*, 77 Me. 17.

³ *Case v. Ranney*, 174 Mich. 673, 140 N. W. 943.

CHAPTER VI

ARREST WITHOUT A WARRANT

§ 114. **By Private Person in Case of Felony.** — **Hue and Cry.** — A private person may arrest without a warrant one whom he sees committing a felony,¹ or when a felony has been actually committed, and he has reasonable grounds within his own knowledge — that is, not merely from the hearsay evidence of the statements of third persons — for believing that the person whom he places under arrest is the felon.² But he has no right to make an arrest without a warrant when a felony has not in fact been committed, no matter how well founded may have been his

¹ *State v. Sutter*, 71 W. Va. 371, 76 S. E. 811.

² *Holley v. Mix*, 3 Wend. (N. Y.) 351; *Ashley's Case*, 12 Coke (Eng. K. B.) 90; *Dodds v. Board*, 43 Ill. 95; *State v. Mowry*, 37 Kan. 369, 15 Pac. 282; *Kennedy v. State*, 107 Ind. 144, 6 N. E. 305; *Brooks v. Com.*, 61 Pa. St. 352; *Long v. State*, 12 Ga. 293; *Wright v. Com.*, 85 Ky. 123, 2 S. W. 904. By statute, in Texas, even a peace officer is not authorized to arrest without a warrant, where the offense, even though a felony, is not committed in the officer's presence. *Williams v. State*, 64 Tex. Cr. App. 491, 142 S. W. 899.

belief that a felony had been committed. In other words, an arrest for felony by a private person without a warrant is lawful only when a felony has actually been committed, and he can justify his act of arrest by proof of the commission of the felony.¹

Under a "hue and cry," however, a private person may make an arrest, even though it should subsequently be shown that no felony had

¹ "Even when there is only probable cause of suspicion, a private person may, without warrant, *at his peril*, make an arrest. I say at his peril, for nothing short of proving the felony will justify the arrest," TILGHMAN, C. J., in *Wakely v. Hart*, 6 Binn. (Pa.) 316. When a private person takes upon himself to arrest another, without a warrant, for a supposed offense he must be prepared to prove, and affirm it clearly and unequivocally in his plea, that felony has been committed; strong suspicions of a felony having been committed will not do; *McKenzie v. Gibson*, 8 U. C. Q. B. (Can.) 100; *Geary v. Stephenson*, 169 Mass. 23, 47 N. E. 508; *Carr v. State*, 43 Ark. 99; *Teagarden v. Graham*, 31 Ind. 422; *Davis v. U. S.*, 16 App. Cas. (D. C.) 442; *Croom v. State*, 85 Ga. 718, 11 S. E. 1035; *Kindred v. Stitt*, 51 Ill. 101; *Siegel v. Connor*, 70 Ill. App. 116; *Cryer v. State*, 71 Miss. 467, 14 So. 261; *Simmerman v. State*, 16 Neb. 615, 21 N. W. 387; *Reuck v. McGregor*, 32 N. J. 70; *Farnam v. Feeley*, 56 N. Y. 451; *People v. Hochstim*, 36 N. Y. Misc. 562, 73 N. Y. S. 626; *State v. Morgan*, 22 Utah 162, 61 Pac. 527; *McCarthy v.*

been committed. A private person joining a "hue and cry" upon information shouted by the pursuers that the pursued person is a felon, may shoot the pursued person if necessary to prevent his escape.¹

The term "hue and cry" means to run and cry after the felon. It was provided by the statute of Winchester, 13 Edw. I., that in case of robbery or other felony fresh pursuit should be made from town to town and county to county by horsemen and footmen, to the seaside.²

If a felony has actually been committed, a private person is justified in arresting one whom he has good reason to believe to be guilty of it, even though the person arrested should afterward be proven innocent.³

De Armitt, 99 Pa. St. 63; *Burch v. Franklin*, 7 Ohio N. P. 155; *Neal v. Joyner*, 89 N. C. 287; *U. S. v. Boyd*, 45 Fed. (U. S.) 851. "Any one may arrest a thief without a warrant;" *Wrexford v. Smith*, 2 Root (Conn.) 171. See also *Gold v. Armer*, 140 N. Y. App. Div. 73, 124 N. Y. S. 1069.

¹ *People v. Lillard*, 18 Cal. App. 343, 123 Pac. 221.

² See 2 Holdsworth's Hist. Eng. L. 99.

³ *Holley v. Mix*, 3 Wend. (N. Y.) 351; *Habersham v. State*, 56 Ga. 61; *Wilson v. State*, 11 Lea (Tenn.) 310; *Brookway v. Crawford*, 48 N. C. 433; *Farnam v. Feeley*, 56 N. Y. 451; *McKenzie v. Gibson*, 8 U. C. Q. B. (Can.) 100.

§ 115. **Assisting a Private Person.** — A private person who has no reasonable grounds within his own knowledge to believe that a felony has been committed, has no right to assist another private person in making an arrest, who is acting without a warrant upon reasonable suspicion which would justify him in making the arrest.¹ But if a private person knows that the one whom he seeks to arrest is a felon, he may command the assistance of a bystander.²

WHAT IS A FELONY?

§ 116. **Definition.** — In English common law a felony comprised the commission of any species of crime which occasioned the total forfeiture of land and goods.³

But this definition does not apply in the United States, because the Constitution of the United States, Article I, Section 12, provides that "no conviction shall work corruption of blood, or forfeiture of estate." Therefore an accurate definition of a felony can be found only in the statutes

¹ *Salisbury v. Com.*, 79 Ky. 425.

² *Hale's P. C.* 76.

³ *Ex parte Wilson*, 114 U. S. 417, 423, 5 Sup. Ct. 935, 29 L. ed. 89, citing 4 Bl. Com., 94, 95, 310; *Com. v. Carey*, 12 Cush. (Mass.) 246; *B. & W. R. Co. v. Dana*, 1 Gray (Mass.) 83.

of the particular State wherein the offense is committed. The courts will not construe an offense to be a felony unless such construction is made necessary by the express words of the statute, or by necessary implication,¹ for the statutes are to be construed so as not to multiply felonies.²

Perhaps a fair statutory definition of a felony in the United States is as follows: "A crime which is punishable by death or imprisonment in the State prison is a felony. All other crimes are misdemeanors."³

§ 117. **By Private Person in Case of Misdemeanor.** — In misdemeanors, the right of a private person to arrest without a warrant is limited to cases of breach of the peace committed in the presence of the arresting party,⁴ or to prevent the continuation of a breach of the peace which

¹ *Wilson v. State*, 1 Wis. 163.

² *Com. v. Carey*, 12 Cush. (Mass.) 246; *Com. v. Carroll*, 8 Mass. 490; *Wilson v. State*, *supra cit.*

³ Rev. Laws of Mass. c. 215, § 1.

⁴ *People v. Morehouse*, 6 N. Y. S. 763; *Phillips v. Trull*, 11 Johns. (N. Y.) 486; *Knot v. Gay*, 1 Root (Conn.) 66; *Price v. Seeley*, 10 Cl. & F. (Eng. H. L.) 28; *Forrester v. Clarke*, 3 U. C. Q. B. (Can.) 151; *State v. Campbell*, 107 N. C. 948, 12 S. E. 441; *Com. v. McNall*, 1 Woodw. (Pa.) 423; *Barclay v. U. S.*, 11 Okla. 503, 69 Pac. 798; *Gold v. Armer*, 140 N. Y. App. Div. 73, 124 N. Y. S. 1069.

has temporarily stopped, but which he has good and reasonable ground to believe will continue but for the arrest.¹ Without a warrant he cannot make an arrest to prevent the commission of an affray or breach of the peace which has not yet begun, but which is simply apprehensive, nor can he arrest without a warrant one who has committed a breach of the peace after the act had been completed.²

Under the New York Code it has been held that, "There is no distinction between a peace officer, without a warrant, and a private individual in respect to the right to arrest for a misdemeanor. To justify either of them in arresting or aiding in the arrest of a person, without warrant, for a misdemeanor, it must appear that the crime has actually been committed or attempted by the person arrested,"³ and this is the rule at common law.

WHAT IS A BREACH OF THE PEACE?

§ 118. **Definition.** — The public peace is that sense of security which every persons feels, and

¹ *Price v. Seeley*, 10 Cl. & F. (Eng. H. L.) 28; *Ingle v. Bell*, 1 M. & W. (Eng. Exch.) 516.

² *Shanley v. Wells*, 71 Ill. 78.

³ *Gold v. Armer*, 140 N. Y. App. Div. 73, 124 N. Y. S. 1069.

which is necessary to his comfort, and for which government is instituted; and a breach of the public peace is the invasion of the security and protection which the law affords every citizen.¹

A breach of the peace is a violation of public order, the offense of disturbing the public peace. An act of public indecorum is also a breach of the peace.²

A policeman is a peace officer especially charged with the duty of preserving the public peace, and may arrest without a warrant any one found violating a valid city ordinance,³ or committing a breach of the peace. A policeman was formerly called a watchman, and the terms are synonymous.⁴

A police officer has a right to make inquiry in a proper manner of any one upon the public streets at a late hour, as to his identity and the occasion of his presence, if the surroundings are such as to indicate to a reasonable man that the public safety demands such identification.⁵

¹ *State v. Archibald*, 59 Vt. 548.

² *Bouvier's Law Dict. (Breach of Peace)*; *Galvin v. State*, 46 Tenn. 283.

³ *Ringhand v. Grannan*, 31 Ohio C. C. 587.

⁴ *State v. Evans*, 161 Mo. 95, 61 S. W. 590.

⁵ *Gisske v. Sanders*, 9 Cal. App. 13, 98 Pac. 43.

§ 119. **Inciting Others to break the Peace.** — Anything which tends to provoke or excite others to break the peace is in itself a breach of the peace.¹ So where a striker meets a non-union workman on the street, and calls him “ a damned scab,” the language, tending to provoke a conflict, is a breach of the peace.² So is calling one “ sheep thief,” and following him, bleating like a sheep.³ And to call a man a “ damn fool ” and a “ bastard ” is a breach of the peace.⁴

§ 120. **No Defense that Words are True.** — The essence of the offense of breaking the peace being the disturbance of the public tranquillity, it is no defense that opprobrious words, tending to provoke violence, are true.⁵

§ 121. **Doing Lawful Act in a Turbulent Manner.** — Where one attempts to abate a public nuisance, in such a manner as to invite resistance, he is guilty of a breach of the peace. As where the defendant, armed with a pitchfork, hoe, and pistol

¹ 4 Bl. Com. 150.

² Com. v. Redshaw, 12 Pa. Co. Ct. 91; Com. v. Silvers, 11 Pa. Co. Ct. 481.

³ State v. Warner, 34 Conn. 276.

⁴ Topeka v. Heitman, 47 Kan. 739, 28 Pac. 1096.

⁵ Dyer v. State, 99 Ga. 20, 25 S. E. 609.

proceeds to remove an obstruction in the highway, knowing that the one who placed the obstruction there is guarding it, is guilty of a breach of the peace.¹ Breaking the locks of doors in such a manner as to provoke a breach of the peace, is a breach of the peace in itself.²

§ 122. **Violent Language. — Threats. — “ Dangerous Person.”** — Where the plaintiff, in a loud and boisterous manner, called the defendant, a police officer, a “ God-damned son of a bitch,” and other names, and threatened to kill the officer if he attempted to arrest him, the plaintiff was guilty of a breach of the peace.³ But the fact that a person is “ impudent ” to an officer will not justify his arrest.⁴ Nor will daring him to arrest without a warrant.⁵

If a man stops before the door of a dwelling-house or shop and uses violent language toward the inmates, and thereby attracts a crowd, and will not desist when requested, he is guilty of a breach of the peace.⁶ So also if he uses loud and violent

¹ *State v. White*, 18 R. I. 473, 28 Atl. 968; *State v. Flanagan*, 67 Ind. 140; *Day v. Day*, 4 Md. 262.

² *Taafé v. Kyne*, 9 Mo. App. 15.

³ *Davis v. Burgess*, 54 Mich. 514, 20 N. W. 540.

⁴ *Jenkins v. State*, 3 Ga. App. 146, 59 S. E. 435.

⁵ *Pinkerton v. Verberg*, 78 Mich. 573, 44 N. W. 579.

⁶ *Cohen v. Huskisson*, 2 M. & W. (Eng. Exch.) 482.

language in his own dwelling-house, addressed to inmates thereof, if the disturbance is such as to attract a gathering of persons outside of his house, this is a breach of the peace.¹ And with much stronger reason would this amount to a breach of the peace if done in a public place.²

Where language of a profane, boisterous or indecent nature, prohibited by a city ordinance, is heard in a building, an officer may enter such building to suppress the disturbance, and may arrest the proprietor or any one interfering with him.³

Mere threats unaccompanied by an apparent intention to execute them will not justify an arrest without a warrant, nor do they constitute a resistance of an officer.⁴ Nor do mere derogatory remarks addressed to the officer by a third person.⁵

Where an officer hears that a person has made threats to "get even" with another, and finds such person carrying a deadly weapon, he may

But see *Ware v. Loveridge*, 75 Mich. 488, 42 N. W. 997. Compare *State v. Schuermann*, 52 Mo. 165.

¹ *Com. v. Foley*, 99 Mass. 497.

² *McCandless v. State*, 2 S. W. (Tex.) 811.

³ *Stoehr v. Payne*, 132 La. 213, 61 So. 206.

⁴ *Statham v. State*, 41 Ga. 507.

⁵ *City of Chicago v. Brod*, 141 Ill. App. 500.

arrest such person forthwith without waiting for an assault to be made.¹

But an officer may not arrest a person merely on the grounds that he is a dangerous person to be at large.²

§ 123. **Discharging Firearms. — Officer's Pistol.** — The wanton discharge of a firearm in a public street of a city is a breach of the peace.³ And where the defendant went to the house of the complaining witness, armed with a gun, during the absence of the male members of the family, and from the porch thereof shot and killed two of his dogs, which were lying in the yard, and thereby terrified the females in the house, such action constitutes a breach of the peace for which an indictment will lie.⁴

An officer may, without a warrant, arrest any one in an assembly of persons, from which assembly on the Sabbath day a firearm is discharged, whether the person arrested be the one or not who actually fired the shot.⁵

Where an officer hears a pistol shot on a public

¹ Schwarz v. Poehlmann, 178 Ill. App. 235.

² Eldredge v. Mitchell, 214 Mass. 480, 102 N. E. 69.

³ People v. Bartz, 53 Mich. 493, 19 N. W. 161.

⁴ Henderson v. Com., 8 Gratt. (Va.) 708.

⁵ People v. Barkas, 255 Ill. 516, 99 N. E. 698.

road, and which is in violation of the law, he may arrest without a warrant the person whom credible witnesses inform him is the guilty party.¹

An officer has no right to fire his pistol as a ruse to stop a fleeing misdemeanor, and such is illegal as a reckless use of firearms.² An officer who shoots at a fleeing person, who had been arrested for a misdemeanor, is guilty of an assault whether he intended to hit him or not.³

§ 124. **Disturbing Public Worship.** — The disturbance of public worship is an act tending to destroy the public morals, and amounts to a breach of the peace.⁴

§ 125. **Prostitutes. — Arrest on Repute. — Suspicion.** — An officer, without a warrant, may arrest a prostitute found plying her vocation.⁵ And a prostitute who, on the street, or while sitting at the window of her room, solicits men from the

¹ *Ricen v. State*, 63 Tex. Cr. App. 89, 138 S. W. 403.

² *State v. Cunningham*, — Miss. — , 65 So. 115.

³ *State v. Sigman*, 106 N. C. 728, 11 S. E. 520.

⁴ *U. S. v. Brooks*, 4 Cranch (U. S. C. C.) 427. But a Sunday-school is not a place of religious "worship," *Hubbard v. State*, 32 Tex. Cr. 391, 23 S. W. 680. *Contra*: *State v. Stuth*, 11 Wash. 423, 39 Pac. 665.

⁵ *Haller v. State*, — Tex. Cr. App. — , 162 S. W. 872.

streets for immoral purposes, is guilty of an offense.¹

But an officer may not arrest one reputed a common prostitute who has committed no offense in his presence.² And an officer is not justified in arresting without a warrant a female quietly walking the streets after leaving a disreputable saloon late at night with no indication of intent to solicit as a prostitute.³ Nor on mere suspicion that a woman walking the streets at night is plying her vocation as a prostitute, doing no act to indicate such intent.⁴

§ 126. **Must be a Public Disturbance.** — An act cannot constitute a breach of the peace unless it disturbs the public, that is to say, an indefinite number of persons. Therefore charging one with being a prostitute and keeping a house of ill fame, if the statement does not in itself tend to disturb others, is not a breach of the peace.⁵

¹ *Harft v. McDonald*, 1 City Ct. Rep. (N. Y. City) 181; *People v. Pratt*, 22 Hun (N. Y.) 300.

² *In re Sarah Way*, 41 Mich. 299, 1 N. W. 1021; *Pinkerton v. Verberg*, 78 Mich. 573, 44 N. W. 579. *Contra*: *Shafer v. Mumma*, 17 Md. 331.

³ *Klein v. Pollard*, 149 Mich. 200, 112 N. W. 717.

⁴ *Pinkerton v. Verberg*, 78 Mich. 573, 44 N. W. 579.

⁵ *State v. Schlottman*, 52 Mo. 164.

§ 127. **Public Shouting.** — Shouting in the streets of a village between nine and ten o'clock in the evening, so loudly as to be heard one hundred and fifty feet distant, is a breach of the peace.¹ But when the officer heard it from another street, and did not see the offender, the offense was not committed in his presence, and an arrest without a warrant would not be justifiable, because the officer had no direct knowledge that it was he who had committed the offense.² Driving a carriage through the streets of a populous city in such a manner as to endanger the safety of the inhabitants, was at common law an indictable offense, and is a breach of the peace.³

§ 128. **Swearing. — Drunkenness.** — Profane swearing is a breach of the peace,⁴ and so is public and disorderly drunkenness.⁵ But an officer can-

¹ *People v. Johnson*, 86 Mich. 175, 48 N. W. 870. But see *Mundine v. State*, 37 Tex. Cr. 5, 38 S. W. 619; *Hardy v. Murphy*, 1 Esp. (Eng. N. P.) 294.

² *People v. Johnson*, 86 Mich. 175, 48 N. W. 870. But see *People v. Bartz*, 53 Mich. 493, 19 N. W. 161.

³ *U. S. v. Hart*, Pet. (U. S. C. C.) 390.

⁴ *Holcomb v. Cornish*, 8 Conn. 375; *Com. v. Linn*, 158 Pa. St. 22, 27 Atl. 843; *State v. Chrisp*, 85 N. C. 528.

⁵ *State v. Lafferty*, 5 Harr. (Del.) 491; *Bryan v. Bates*, 15 Ill. 87; *State v. Freeman*, 86 N. C. 683.

not lawfully make an arrest, without a warrant, on a charge of drunkenness unless the person arrested is drunk at the time of the arrest.¹

§ 129. **Use of Force, by Private Person.** — A private person attempting to make an arrest in case of a felony may, in those cases where a private person can lawfully arrest, use all force necessary to accomplish the arrest, even to the taking of life. So also may he kill to prevent the commission of a felony, when it cannot be otherwise prevented.

But a private person has no right to arrest one for whom he knows that a warrant has been issued for an assault with intent to commit murder, unless at the time he is assisting the officer who has the warrant.²

§ 130. **Arrest by Officer without a Warrant.** — **Suspicion.** — **Felony.** — **Proclamation.** — **Misdemeanor.** — **Militia.** — An officer may arrest without a warrant, whenever a private person may do so; and his authority extends beyond that of a private person in that he may arrest without a warrant one whom he has reasonable ground to But see *Com. v. O'Connor*, 7 Allen (Mass.) 583, holding drunkenness no crime at common law.

¹ *Eldredge v. Mitchell*, 214 Mass. 480, 102 N. E. 69.

² *Kirbie v. State*, 5 Tex. App. 60.

suspect has committed a felony,¹ whether he acts upon his own knowledge, or by facts communicated by others;² and it is not necessary that a communication in fact exist, but it is sufficient that the communication in its popular sense would import such a charge.³ If reasonable grounds exist for the suspicion, he is not liable, although no crime of any sort has been committed.⁴

¹ *Davis v. U. S.*, 16 App. Cas. (D. C.) 442; *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089; *Williams v. State*, 44 Ala. 41; *Chandler v. Rutherford*, 101 Fed. (U. S.) 774; *Ex parte Morrill*, 13 Sawyer (U. S.) 322; *Tooley's Case*, 2 Ld. Raymond (Eng. K. B.) 1296; *Filer v. Smith*, 96 Mich. 347, 55 N. W. 999; *People v. Burt*, 51 Mich. 199, 16 N. W. 378; *Fulton v. Staats*, 41 N. Y. 498; *Hedges v. Chapman*, 2 Bing. (Eng. C. P.) 523; *Hamilton v. Calder*, 23 N. B. R. (Can.) 373; *Com. v. Phelps*, 209 Mass. 396, 95 N. E. 868; *Philips v. Leary*, 114 N. Y. App. Div. 871, 100 N. Y. S. 200.

² *Holley v. Mix*, 3 Wend. (N. Y.) 350; *Filer v. Smith*, 96 Mich. 347, 55 N. W. 999; *Chandler v. Rutherford*, 101 Fed. (U. S.) 774; *Williams v. State*, 44 Ala. 41.

³ *Com. v. Phelps*, 209 Mass. 396, 95 N. E. 868.

⁴ *Danovan v. Jones*, 36 N. H. 246; *Com. v. Cheney*, 141 Mass. 102, 6 N. E. 724; *Holley v. Mix*, 3 Wend. (N. Y.) 351; *State v. Symes*, 20 Wash. 484, 55 Pac. 626; *Muscoe v. Com.*, 86 Va. 443, 10 S. E. 534; *State v. Taylor*, 70 Vt. 1, 39 Atl. 447; *Wade v. Chaffee*, 8 R. I. 224; *Neal v. Joyner*, 89 N. C. 287; *State v. Grant*, 76 Mo. 236; *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089; *Wright v. Com.*, 85 Ky. 123, 2 S. W. 904;

A proclamation by the Governor of a State that a felony has been committed, is sufficient evidence of the commission of such felony to justify an arrest of the supposed felon by a peace officer.¹

Where a dangerous wound is inflicted, which

Bright *v.* Patton, 5 Mackey (D. C.) 534; People *v.* Pool, 27 Cal. 572; Lewis *v.* State, 3 Head (Tenn.) 127; State *v.* West, 3 Ohio St. 509; Burns *v.* Erben, 40 N. Y. 463; People *v.* Hochstim, 36 N. Y. Misc. 562, 73 N. Y. S. 626; McCarthy *v.* De Armitt, 99 Pa. St. 63; Diers *v.* Mallow, 46 Neb. 121, 64 N. W. 722; Doering *v.* State, 49 Ind. 56; Scott *v.* Eldridge, 154 Mass. 25, 27 N. E. 677; Williams *v.* State, 44 Ala. 41; Carr *v.* State, 43 Ark. 99; Filer *v.* Smith, 96 Mich. 347, 55 N. W. 999; Hadley *v.* Perks, L. R. 1 Q. B. 444. But see Marsh *v.* Smith, 49 Ill. 396; Warner *v.* Grace, 14 Minn. 487; Cryer *v.* State, 71 Miss. 467, 14 So. 261. An officer arresting for a suspected misdemeanor is protected only when a misdemeanor has been committed or attempted. Gold *v.* Armer, 140 N. Y. App. Div. 73, 124 N. Y. S. 1069. But an officer may be civilly liable for a false arrest on a charge of intoxication. See § 300, *infra*. The Canadian Criminal Code of 1892, § 22, provides that, "Every peace officer who, on reasonable and probable grounds, believes that an offense for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offense, is justified in arresting such person without warrant, whether such person is guilty or not."

¹ Eames *v.* State, 6 Humph. (Tenn.) 53.

afterward proves fatal, a peace officer need not wait to ascertain whether the injured person dies, and if, as a reasonable man, he has a suspicion, and probable cause to believe that the wound is such that a felony is likely to result from it through the injured person's death, he may be found to have had reasonable cause to believe that a felony had been committed, as affecting his right to arrest the offender without a warrant.¹

Where an officer under orders of the Post Office department is investigating theft of letters, he may, without malice, and upon reasonable belief, detain and search a person he believes guilty, without a warrant.²

But a police officer may arrest for misdemeanor only when actually committed, and in his presence.³

The New York Code of Criminal Procedure, § 177, authorizes an officer to arrest without a warrant for misdemeanor, only when the crime is committed or attempted in his presence, but the arrest need not be made at the very time of the commission or attempt.⁴

¹ *Com. v. Phelps*, 209 Mass. 396, 95 N. E. 868; 2 Hale's P. C. 94.

² *Mayer v. Vaughan*, 6 C. C. C. (Can.) 68.

³ *Markey v. Griffin*, 109 Ill. App. 212.

⁴ *Stevens v. Gilbert*, 120 N. Y. S. 114; *Stittgen v. Rundle*, 99 Wis. 78, 74 N. W. 536.

A member of the State militia, while in active service, under the command of his superior officer, has the same power as a peace officer of the State, and is entitled to the same immunity as such officers in the performance of duty.¹

§ 131. **Suspicion must be well Founded.** — But an officer has no right to arrest on suspicion that is not well founded, as in case of a mere suspicion not supported by facts, circumstances, or credible information.² Thus the information given by an accomplice is not sufficient to justify an arrest.³ And neither an officer nor a private person in making an arrest upon suspicion without a warrant has a right to kill the supposed felon, either to effect the arrest or prevent an escape, except in self-defense.⁴ The right of an officer to make an arrest on a reasonable suspicion in case of felony does not extend to suspicion of misdemeanor.

A city ordinance authorizing the police to arrest all persons who shall be found in the act of com-

¹ *Franks v. Smith*, 142 Ky. 232, 134 S. W. 484.

² *People v. Burt*, 51 Mich. 199, 16 N. W. 378; *Williams v. State*, 44 Ala. 41.

³ *Wills v. Jordan*, 20 R. I. 630, 41 Atl. 233.

⁴ *Brooks v. Com.*, 61 Pa. St. 352; *Conraddy v. People*, 5 Park. Cr. (N. Y.) 234. *Contra*: *Shanley v. Wells*, 71 Ill. 78.

mitting a felony or misdemeanor, or who shall be reasonably *suspected* of having committed such act, confers no authority to arrest without a warrant in cases other than where such arrest would be lawful under existing laws. Such municipal ordinance attempting to authorize the arrest, without a warrant, of a person suspected of having committed a misdemeanor is invalid.¹

§ 132. **Concealed Weapons.** — Under a statute requiring all persons suspected of carrying concealed weapons to be searched, an officer receiving information that a person is carrying a concealed weapon is justified in searching such person without a warrant.² Except when authorized by statute an officer has no authority, without a warrant, on suspicion or information that one is carrying concealed weapons, to arrest him, and search his person to ascertain if he is violating the law.³

§ 133. **Offenses on Trains.** — A statute which directs the conductor of a train on which a pas-

¹ *Gunderson v. Struebing*, 125 Wis. 173, 104 N. W. 149.

² *Keady v. People*, 32 Colo. 57, 74 Pac. 892; *Saye v. State*, 50 Tex. Cr. App. 569, 99 S. W. 551.

³ *Stewart v. State*, 2 Ga. App. 98, 58 S. E. 390.

senger uses obscene language in the presence of other passengers, to notify a peace officer at the first stopping place, authorizes such officer to make an arrest of such person without a warrant.¹

But an officer has no right to arrest without a warrant a person pointed out by the conductor of a train as unlawfully evading his fare in violation of a statute.²

§ 134. **Finder of Lost Articles.** — An officer has no authority to arrest without a warrant one who has found a lost article and refuses to deliver it on demand of a police officer to a person claiming to own it, without sufficient identification.³

§ 135. **Obstructing Ways.** — The act of one person halting on the street for a reasonable time without misbehaving himself in any way is not such a nuisance as the city has a right to forbid by its laws under the general power delegated to it,⁴ therefore if an officer finding several persons obstructing the sidewalk requests them to disperse, and all do so excepting one, the re-

¹ *Com. v. Marcum*, 135 Ky. 1, 122 S. W. 215.

² *Palmer v. Me. Cent. R. R. Co.*, 92 Me. 399, 42 Atl. 800.

³ *Ryan v. City of Chicago*, 124 Ill. App. 188.

⁴ *State v. Hunter*, 106 N. C. 796, 11 S. E. 366; *Cooley Const. Lim.* 200.

maining one is not subject to arrest for obstructing the sidewalk and failing to "disperse" upon notice.¹

A person ordered by an officer to "move on" is entitled to a reasonable time in which to obey the command before being arrested on the charge of loitering in violation of a city ordinance.²

In absence of a statute providing for the exclusive appropriation of a street for the purpose of parades, a policeman without a warrant has no right to arrest a citizen for refusing to make way for a parade on a public street, even though he had been ordered by his superior officer to clear the street.³

§ 136. **License Law.** — A deputy license inspector has no authority, without a warrant, to arrest for violation of a license law.⁴

¹ *State v. Hunter*, 106 N. C. 796, 11 S. E. 366. See also § 150, *infra*.

² *Price v. Tehan*, 84 Conn. 164, 79 Atl. 68. A city ordinance of Boston, as amended December 21, 1914, provides that, "No person shall, in a street, wilfully or unreasonably obstruct the free passage of foot travellers, nor shall any person in a street unreasonably saunter or loiter for more than seven minutes after being directed by a police officer to move on."

³ *White v. State*, 99 Ga. 16, 26 S. E. 742.

⁴ *Gambill v. Fuqua*, 148 Ala. 448, 42 So. 735.

§ 137. **Forest Reserves. — National Parks. —** By authority of the federal Act, Feb. 6, 1905, all persons employed in the forest reserve and national park service of the United States shall have authority to make arrests for the violation of the laws and regulations relating to the forest reserves and national parks, and any person so arrested shall be taken before the nearest United States commissioner, within whose jurisdiction the reservation or national park is located, for trial.

§ 138. **Arrest for Violation of a City Ordinance.** — An officer may arrest, without a warrant, one who in his presence commits a breach of the peace;¹ and by authority of statute, city charter, or ordinance,² he may arrest without a warrant, one who, within his jurisdiction, commits a misdemeanor other than a breach of the peace, as,

¹ *Com. v. Tobin*, 108 Mass. 426; *Tracy v. Williams*, 4 Conn. 107; *Douglass v. Barber*, 18 R. I. 459, 28 Atl. 805; *In re Powers*, 25 Vt. 261; *State v. Russell*, 1 Houst. Cr. (Del.) 122; *Fleetwood v. Com.*, 80 Ky. 2; *Boutte v. Emmer*, 43 La. 980; *State v. Guy*, 46 La. 1441; *Hayes v. Mitchell*, 80 Ala. 183; *Veneman v. Jones*, 118 Ind. 41, 20 N. E. 644; *Beville v. State*, 16 Tex. App. 70.

² *Main v. McCarty*, 15 Ill. 441; *Roderick v. Whitson*, 51 Hun (N. Y.) 620, 4 N. Y. S. 112; *White v. Kent*, 11 Ohio St. 550.

Presence. — When specially authorized, — as by the city charter of Chicago, — an officer may arrest either with or without warrant, for a breach of the peace or threat to break the peace, even though the breach or threat was not committed in the presence of the arresting officer.¹ But a mere threat to break the peace will not justify an arrest without a warrant, unless the threat is accompanied by an open act in the attempted execution thereof.²

The legislature has the power to authorize an officer to make an arrest without a warrant for a misdemeanor committed out of the presence of the officer.³

§ 140. **Presence is Presumed.** — When an officer makes an arrest for a breach of the peace, there is a *prima facie* presumption that he had a warrant, or that the offense was committed in his presence.⁴

¹ *Main v. McCarty*, 15 Ill. 441. Judicial notice will not be taken of a city ordinance, and one attempting to justify an arrest as being in accordance with a city ordinance, must plead and prove such ordinance. *Stittgen v. Rundle*, 99 Wis. 78, 74 N. W. 536.

² *Quinn v. Heisel*, 40 Mich. 576; *Schwarz v. Poehlmann*, 178 Ill. App. 235.

³ *Childers v. State*, 156 Ala. 96, 47 So. 70.

⁴ *Davis v. Pac. Telephone, etc. Co.*, 127 Cal. 312, 57 Pac. 764, 59 Pac. 698.

§ 141. **What is meant by " Presence."** — By presence of the officer is meant that he must actually see the offense committed, unless he hears it and immediately proceeds to the scene.¹ But it has been held that being near enough to see is not sufficient.² And if within his vision, it is immaterial that it was at a distance.³

If a person creates a breach of the peace by cursing in an officer's presence, such officer may arrest without a warrant, whether he heard the cursing or not.⁴

§ 142. **Arrest Outside of Officer's Jurisdiction.** — An officer has no authority to make an arrest outside of his jurisdiction, even with a warrant, except in those cases in which a private person may act without a warrant. Then an officer may make the arrest, not by virtue of his office, for that is limited by his jurisdiction, but by that

¹ *Ramsey v. State*, 92 Ga. 53, 17 S. E. 613; *State v. McAfee*, 107 N. C. 812, 12 S. E. 435; *Dilger v. Com.*, 88 Ky. 550, 11 S. W. 651; *State v. Williams*, 36 S. C. 493, 15 S. E. 554; *Brooks v. State*, 114 Ga. 6, 39 S. E. 877; *Hawkins v. Lutton*, 95 Wis. 492, 70 N. W. 483.

² *Russell v. State*, 37 Tex. Cr. 314, 39 S. W. 674.

³ *People v. Bartz*, 53 Mich. 493, 19 N. W. 161.

⁴ *Smith v. State*, 10 Ga. App. 36, 72 S. E. 527.

right which the law places upon him as a citizen owing a duty to the State.¹

§ 143. **Effect of Submission to Illegal Arrest.** — A person arrested by an officer outside of his jurisdiction who fails to object at the time of the arrest, and voluntarily accompanies the officer, thereby waives the illegality of the arrest, and cannot subsequently object to it as for that reason illegal.²

§ 144. **Arrest for Fraud.** — At the request of a keeper of a restaurant, a police officer has no right to arrest without a warrant, one who, in taking a meal at a restaurant, fraudulently substitutes the check given him for one of less amount, which latter he pays,³ because it was not a criminal act, nor did it tend *immediately* to create a breach of the peace.

§ 145. **Entering Unfastened Door to arrest for Breach of the Peace.** — A constable, or other peace officer, has a right, by virtue of his office, without a warrant, to enter through an unfastened door, a

¹ 2 Hale's P. C. 115; *Ressler v. Peats*, 86 Ill. 275.

² *In re Popejoy*, 26 Col. 32, 55 Pac. 1083.

³ *Boyleston v. Kerr*, 2 Daly (N. Y.) 220.

house in which there is a noise amounting to a disturbance of the peace, and arrest any one disturbing the peace there in his presence.¹

§ 146. **Entering Fastened Door to arrest for Breach of the Peace.** — After announcing his authority, an officer may, upon demanding and being refused admittance, break open a fastened door even at night, for the purpose of suppressing or preventing a breach of the peace and making an arrest therefor.² But a private person may not,³ except to prevent a felony.⁴

§ 147. **Entering to arrest for Peaceable Drunkenness.** — When the statute authorizes an arrest for "drunkenness by the voluntary use of intoxicating liquor," the officer may take the guilty party from her own room in her own dwelling-house, where she is making no disturbance, and is not exposed to public view, but is lying in a drunken stupor; because the *place* where the

¹ *Com. v. Tobin*, 108 Mass. 426; *Ford v. Breen*, 173 Mass. 52, 53 N. E. 136.

² *McLennon v. Richardson*, 15 Gray (Mass.) 74; *State v. Lafferty*, 5 Harr. (Del.) 491; *State v. Stouderman*, 6 La. Ann. 286; *McCullough v. Com.*, 67 Pa. St. 30; *R. v. Smith*, 6 C. & P. (Eng. N. P.) 136.

³ *Rockwell v. Murray*, 6 U. C. Q. B. (Can.) 412.

⁴ *Handcock v. Baker*, 2 B. & P. (Eng. C. P.) 260.

offense is committed is not an element to be considered in determining whether the accused person is guilty under the law.¹ And the legality or illegality of the arrest does not in any way affect the offense with which she is charged,² although if entrance to her house for the purpose of making the arrest was obtained illegally, she would have an action against the arresting party for the trespass.

But where the statute makes intoxication in a *public* place a misdemeanor, a person cannot lawfully be arrested and taken from a private house for such offense.³

§ 148. **Arrest without Warrant for Breach of the Peace must be Immediate.** — Though at common law an officer might without warrant arrest for a breach of the peace committed in his view, the arrest must have been made at the time of, or within a reasonable time after, the commission of the offense,⁴ — that is, the officer must imme-

¹ *Com. v. Conlin*, 184 Mass. 195, 68 N. E. 207.

² *Ibid.*

³ *People v. Brown*, 64 N. Y. Misc. 677, 120 N. Y. S. 859.

⁴ *Wahl v. Walton*, 30 Minn. 506, 16 N. W. 397. Under the N. Y. Code an arrest for a misdemeanor need not be immediate; *Stevens v. Gilbert*, 120 N. Y. S. 114. See also § 130, *supra*.

diately set about the arrest, and follow up the effort until the arrest is made. There must be a continued pursuit and no cessation of acts tending toward the arrest from the time of the commission of the offense until the apprehension of the offender.¹ Any delay for purposes foreign to the arrest will make the officer a trespasser.

But where a peace officer is assaulted, and allows his assailant to walk away for a distance of fifty or seventy-five yards, he still has the right to arrest him for the assault.² Where the officer saw the defendant committing a misdemeanor in the street, and went for another officer, returning in half an hour, when he arrested the defendant, he was held to be justified.³ But a delay of two hours has been held unjustifiable.⁴

§ 149. **Stale Offense Less than Felony requires a Warrant.** — In all cases not felonies, or likely to result in one, where the offense is not committed in the officer's view, or the act done or threat made is not fresh, a constable or policeman has no

¹ *Wahl v. Walton, supra cit.*

² *State v. McClure*, — N. C. —, 81 S. E. 458.

³ *Butolph v. Blust*, 5 Lans. (N. Y.) 84.

⁴ *R. v. Walker*, 6 Cox C. C. (Eng.) 371; see also *Joyce v. Parkhurst*, 150 Mass. 243, 22 N. E. 899; *Com. v. Ruggles*, 6 Allen (Mass.) 588.

authority to make an arrest without a warrant,¹ unless authorized by an act of the legislature.² So where an officer, under a city ordinance, arrests a person as a vagrant, not having a visible means of support, the offense, if there was one, being a misdemeanor not committed in his presence, he is liable in trespass.³

If an officer sees a crime committed and does not make an arrest at that time, but waits several days during which time he might have had a warrant issued, he cannot then make an arrest for the offense without a warrant.⁴

§ 150. **Arrest of Person Rightfully Standing near Sidewalk.** — Except on charge of felony an officer has no right to arrest without a warrant, one whom he finds peaceably standing in front of his place of residence, between the sidewalk and building, who is not creating a disturbance.⁵

¹ *Shanley v. Wells*, 71 Ill. 78.

² See §§ 138, 139, *supra*.

³ *Shanley v. Wells*, *supra cit.* But see *People v. Craig*, 152 Cal. 42, 91 Pac. 997, holding that "vagrancy" may be committed in the presence of an officer.

⁴ *Wiggins v. State*, — Ga. App. —, 80 S. E. 724; *State v. McClure*, — N. C. —, 81 S. E. 458.

⁵ *Com. v. Ridgeway*, 2 Pa. Dist. 59. See also § 135, *supra*.

§ 151. **Pursuit of Felon.** — In case of a dangerous wounding, whereby a felony is likely to ensue, an officer may, upon probable suspicion, without a warrant, arrest the party causing the wound, and for that purpose is authorized to break doors, or even kill the felon, if he cannot otherwise be taken.¹

§ 152. **Duty of Private Person to arrest a Felon.** — Any private person, and with much stronger reason, any officer who is present when any felony is committed is bound by the law to arrest the felon, on pain of fine and imprisonment if he escapes through the negligence of the standers-by.² And they may justify breaking open the doors upon following such felon; and if they kill him, provided he cannot otherwise be taken, it is justifiable;³ though if they are killed in endeavoring to make such arrest, it is murder.⁴

¹ 2 Hale's P. C. 88; *Shanley v. Wells*, *supra cit.*; 4 Bl. Com. 292.

² 2 Hawkins' P. C. 74; 4 Bl. Com. 293; *Long v. State*, 12 Ga. 293.

³ 4 Bl. Com. 292; *Foster* (Eng.) 271; *U. S. v. Clark*, 31 Fed. (U. S.) 710; *Thomas v. Kinkad*, 55 Ark. 502, 18 S. W. 854; *Conraddy v. People*, 5 Park. Cr. (N. Y.) 234; *Reneau v. State*, 2 Lea (Tenn.) 720; *Brown v. Weaver*, 76 Miss. 7, 23 So. 388; *Head v. Martin*, 85 Ky. 480, 3 S. W. 622; *State v. Sigman*, 106 N. C. 728, 11 S. E. 520. ⁴ 2 Hale's P. C. 77.

States army in any part of the State without a warrant.¹

A military officer cannot lawfully break into a dwelling-house for the purpose of capturing a deserter.²

§ 155. **Arrest by a Bail.** — A bail may arrest his principal at any time and anywhere, even in another State, using no violence unless there is resistance. And he may delegate the power to another in writing to do it for him. But the party to whom the power is delegated cannot delegate the power to another, although he may call in others to assist him in making the arrest.³

A bail, or one authorized by him, after due notice, demand of admittance, and refusal, may forcibly enter a dwelling-house to effect the arrest of the principal.⁴

§ 156. **Arrest to prevent Crime. — Suspicion.** — With respect to interference and arrests in order to prevent the commission of a crime, any per-

¹ *State v. Pritchett*, 219 Mo. 696, 119 S. W. 386.

² *Clay v. U. S.*, Dev. Ct. Cl. (U. S.) 25.

³ *State v. Mahon*, 3 Harr. (Del.) 568; *Taylor v. Taintor*, 16 Wall. (U. S.) 366, 21 L. ed. 287; *In re Von Der Ahe*, 85 Fed. (U. S.) 959.

⁴ *Read v. Case*, 4 Conn. 166.

son may lay hold of a lunatic about to commit any mischief which, if committed by a sane person, would constitute a criminal offense,¹ or any other person whom he shall see on the point of committing a treason or felony, or doing any act which will manifestly endanger the life or person of another, and may detain him until it may be reasonably presumed that he has changed his purpose.² Thus, any one may justify breaking and entering a party's house and imprisoning him, to prevent him from murdering his wife, who cries out for assistance.³ But a person may not be arrested simply because it is dangerous that he be at large.⁴ And an officer has no right to arrest a person simply because he is acting in a suspicious manner.⁵

Where one interferes to prevent others from fighting, he should first notify them of his intention to prevent a breach of the peace.⁶

¹ *Lott v. Sweet*, 33 Mich. 308; *Paetz v. Dain*, Wils. (Ind.) 148.

² *Schwarz v. Poehlmann*, 178 Ill. App. 235.

³ *Handcock v. Baker*, 2 B. & P. (Eng. C. P.) 260; Selw. 3d ed. 830; Bacon's Abr. Trespass, D 3.

⁴ *Eldredge v. Mitchell*, 214 Mass. 480, 102 N. E. 69.

⁵ *Philips v. Leary*, 114 N. Y. App. Div. 871, 100 N. Y. S. 200.

⁶ 1 East P. C. 304; Bacon's Abr. Trespass, D 3; 2 Rolles Abr. 559.

§ 157. **Hue and Cry.** — It was formerly the law in England, by Statute 13 Edward I, Chapter 3, that every hundred (a division of a county) ¹ was bound to answer for all robberies therein committed, unless they took the felon.² For that reason it was common to make fresh pursuit, with hue and cry, by both horsemen and footmen,³ of one who had committed a felony. These acts are now repealed, but an arrest by hue and cry although seldom known is not obsolete.⁴ Of the same effect, however, in later usage, is a written proclamation issued on the escape of a felon from prison, requiring all persons to aid in retaking him.

§ 158. **Arrest on Oral Order of Magistrate.** — Although an arrest may be made on the oral order of a magistrate as, for example, for an act of contempt committed in the face of the court,⁵

¹ *Regan v. N. Y. etc. R. R. Co.*, 60 Conn. 124, 22 Atl. 503. See § 114, *supra*. In Delaware the subdivisions of a county are called "hundreds." They correspond to "towns," in New England; "townships," in New Jersey, and "parishes" in Louisiana.

² *Grosvenor v. Inhab. etc. of St. Augustine*, 12 East (Eng. K. B.) 244.

³ Made imperative by Stat. 27 Eliz. c. 13.

⁴ *People v. Lillard*, 18 Cal. App. 343, 123 Pac. 221.

⁵ *Holcomb v. Cornish*, 8 Conn. 374.

a mayor who orders the arrest of any persons connected with an obscene show about to be given, acts in a ministerial and not in a judicial capacity, and therefore has no authority to command the arrest without a warrant.¹

The oral command of a justice is just as imperative upon an officer as a formal warrant founded on a formal complaint. And if a justice, from corrupt or malicious motives, order an officer to make an arrest, the officer is, nevertheless, as well protected by the oral order as he would have been by a warrant properly issued.²

Although a magistrate may order the arrest of any one for a public offense committed in his presence, he has no power, without an examination or hearing, to commit him to prison.³

In Kentucky a private person may arrest on the oral order of a magistrate the offender who commits an offense in the magistrate's presence.⁴

¹ *Brewer v. Wynne*, 162 N. C. 319, 79 S. E. 629.

² *Forrist v. Leavitt*, 52 N. H. 481.

³ *Touhey v. King*, 9 Lea (Tenn.) 422.

⁴ *Com. v. West*, 113 S. W. (Ky.) 76.

CHAPTER VII

BREAKING DOORS TO MAKE AN ARREST

§ 159. **Man's Habitation is Sacred.** — The law regards a man's house as his castle, his place of refuge, his sanctuary, and is predisposed to protect it against forcible invasion and disturbance. This protection is afforded, not only because of man's natural right of undisturbed habitation, which nature has ever impelled him to maintain, even when in a savage state, but also because of the terror which usually results from an invasion of this right, and the possibility of such invasion causing a breach of the peace through being met with resistance.

§ 160. **Breaking into Dwelling-house to serve Process.** — As a result of this tender regard of the law for the habitation of man, it is well settled that an outer door or window of a dwelling-house cannot be broken to execute civil process. In the execution of criminal process, however, the law, with due regard for the well-settled principle

"individual rights yield to public necessity," allows the habitation of man to be entered forcibly under certain conditions.¹

§ 161. **Notification, Demand, and Refusal are Necessary.** — To serve a criminal process a dwelling-house may be forcibly entered by an officer after a proper notification of the purpose of the entry, and a demand upon the inmates to open the house, and a refusal by them to do so.² And even if it appeared that the defendant was not in the house at the time such arrest was attempted to be made, yet the breaking and entering the house for the purpose of arresting him would be justified, if the officer acted in good faith, under reasonable belief that the party was there,³ and after proper notice broke and entered the house, doing no unnecessary violence or damage;⁴ and

¹ *Com. v. Reynolds*, 120 Mass. 190; *Shanley v. Wells*, 71 Ill. 78; *Cahill v. People*, 106 Ill. 621; *State v. Smith*, 1 N. H. 346.

² *Barnard v. Bartlett*, 10 Cush. (Mass.) 501; *McLennon v. Richardson*, 15 Gray (Mass.) 74; *State v. Oliver*, 2 Houst. (Del.) 585; *Semayne's Case*, 5 Coke (Eng. K. B.) 91 b; *Lannock v. Brown*, 2 B. & Ald. (Eng. K. B.) 592; *Read v. Case*, 4 Conn. 166.

³ *Com. v. Irwin*, 1 Allen (Mass.) 587.

⁴ *Com. v. Reynolds*, 120 Mass. 190; *Com. v. Irwin*, *supra cit.*

such is the law even though the offense for which the warrant was issued is but a misdemeanor.¹

§ 162. **Name of Party sought need not be given unless Requested.** — It is not necessary to notify the occupier of the house who the person sought to be arrested is, if no inquiry is made in relation thereto, even if the person sought to be arrested is not actually in the house, it being sufficient for the occupier to know that an officer, provided with a warrant against an alleged offender, who believes that he is within his house, is seeking to arrest him there.²

§ 163. **Private Person's Right to break Doors.** — Any private person who is present when any felony is committed, is bound to arrest the felon, and may break open doors when following him in fresh pursuit upon reliable information.³ But a private person is not justified in breaking doors to arrest a person upon a groundless suspicion, no

¹ *Com. v. Reynolds*, 120 Mass. 190; *State v. Shaw*, 1 Root (Conn.) 134; *State v. Mooring*, 115 N. C. 709, 20 S. E. 182; *State v. Oliver*, 2 Houst. (Del.) 585; *U. S. v. Faw*, 1 Cranch (U. S. C. C.) 487. *Contra*: *Com. v. County Prison*, 5 Pa. Dist. 635.

² *Com. v. Reynolds*, 120 Mass. 190.

³ *Brooks v. Com.*, 61 Pa. St. 352.

matter how reasonable or well founded his suspicion may be.¹

§ 164. **To whom the Protection of the Dwelling-house is Extended.** — A dwelling-house cannot be forced by an officer in the execution of civil process against the occupier or any of his family who have their domicil or ordinary residence there; and this immunity from arrest extends not only to the occupant, his wife and children, but to domestic servants, and permanent boarders and lodgers as well, but not to strangers or visitors.² So that if a stranger whose ordinary residence is elsewhere, upon a pursuit, take refuge in the house of another, the house is not *his* castle; and the officer may break open the doors or windows in order to execute his process.

If the occupant should refuse admission to the officer *after his purpose and authority were made known*, the law would consider him as conspiring with the party pursued to screen him from arrest, and would not allow him to make his house a place of refuge.³

§ 165. **Breaking into Dwelling-house to prevent Escape.** — It would be different, however, if the

¹ *Ibid.* ² *Oystead v. Shed*, 13 Mass. 520. ³ *Ibid.*

occupier of a house was arrested outside of his house, and then fled to his house for protection. In such case the officer would have a clear right to pursue and break into the house, for he would not then be effecting an arrest, but would be preventing an escape. But the breaking will not be justified unless the arrest outside the house was absolutely complete.¹

§ 166. **Arrest within House by Officer Outside.** — Where one is arrested by the officer touching him for the purpose of arresting him, through a broken window,² the arrest having been consummated by the touching of the defendant, the officer may break an outer door, not to execute the civil process, for that was executed by the act of arrest, but to remove his prisoner.

§ 167. **Unannounced Breaking to make Original Arrest not Justified.** — It was decided as early as 1605,³ that the householder must be requested to open the door before the officer can break his way in; and such is still the law.⁴ In fact it is neces-

¹ See Chapter IV as to acts completing arrest.

² *Sandow v. Jervis*, E. B. & E. (Eng. Q. B.) 935, 942.

³ *Semayne v. Gresham*, 5 Coke (Eng. K. B.) 91.

⁴ *Barnard v. Bartlett*, 10 Cush. (Mass.) 501; *Com. v. Reynolds*, 120 Mass. 190.

sary (1) that the officer give notice of his purpose and his authority, (2) demand admission, and (3) be refused admission, before he can break a door or window of a dwelling-house to make an arrest on either a civil or a criminal process.

§ 168. **Breaking may be unannounced if Arrest is following Escape.** — But if a person who has been arrested escapes, and takes refuge in the house of another, the officer may break into such other person's house to retake him; and if the pursuit is fresh, so that the occupant is consequently aware of the object of the officer, no notice of purpose, demand of admission, and refusal to admit is necessary to justify the officer in breaking the outer door.¹

§ 169. **Officer may Re-enter Forcibly if Necessary.** — If an officer has once been lawfully in the house in making an arrest on civil process, he may re-enter, using as much force as may be necessary.² So where an officer obtained a peaceable entrance through an outer door, and before he could make an arrest was forcibly ejected from the house, and the door fastened against him, he

¹ *Allen v. Martin*, 10 Wend. (N. Y.) 300.

² *Genner v. Sparks*, 6 Mod. (Eng. K. B.) 173.

was justified in forcing open the door, without a demand of re-admittance, and making the arrest.¹

§ 170. **Inner Doors may be broken on Any Process.** — While the law prohibits the breaking of the outer door of a dwelling-house to execute civil process, it does not extend the protection to the inner doors,² except where an inner door is the entrance to a distinct apartment,³ or to the outer doors or windows of other buildings not the dwelling of the debtor.⁴

§ 171. **When Usual Inner Door is a Legal Outer Door. — Lodging Houses.** — Where a house is let to lodgers, the owner retaining one room thereof for himself, an officer may break open an inner door which leads to the owner's room, for the purpose of arresting him.⁵

But if the whole house be let in lodgings, as each lodging is then considered a dwelling-house, in which burglary may be stated to have been committed, it has been supposed that the door of

¹ *Aga Kurhboolie Mahomed v. R.*, 3 Moore, (Eng. P. C.) 164.

² *Hubbard v. Mace*, 17 Johns. (N. Y.) 127.

³ *Stedman v. Crane*, 11 Metc. (Mass.) 295.

⁴ *Haggerty v. Wilber*, 16 Johns. (N. Y.) 287.

⁵ *Williams v. Spencer*, 5 Johns. (N. Y.) 352.

each apartment would be considered an outer door which could not be legally broken open to execute a civil arrest.¹

WHAT IS A DWELLING-HOUSE?

§ 172. **Definition.** — A dwelling-house is a building inhabited by man. A house usually occupied by the person there residing and his family.²

§ 173. **Use determines Character.** — The use to which a house is put, at the time of the offense, determines its character.³ A barn may be converted into a dwelling-house, or a dwelling-house into a barn, by a change of its uses.⁴ A cabin in the woods, built as a permanent structure for wood-choppers to occupy, is a dwelling-house if in actual use as a place of abode.⁵

A house merely designed as a dwelling-house, but not occupied for that purpose, is not a dwelling-house.⁶

¹ *Oystead v. Shed*, 13 Mass. 519.

² *Bouvier's Law Dict.* (Dwelling-house). It is equivalent to mansion house; *Com. v. Pennoek*, 3 S. & R. (Pa.) 199.

³ *State v. Williams*, 40 W. Va. 268, 21 S. E. 721; *Davis v. State*, 38 Ohio St. 506.

⁴ *Davis v. State*, *supra cit.*

⁵ *State v. Weber*, 156 Mo. 257, 56 S. W. 893.

⁶ *State v. Warren*, 33 Me. 30.

§ 174. **Use of Portion as Dwelling.** — It is not necessary that the entire building be used as a dwelling-place, to make the entire building a dwelling-house. If part of a building is used as a place of abode, every part of the building to which there is an internal communication from the part used as a dwelling is part of the dwelling-house. Thus the loft of a coach-house and stable which is used as the dwelling of the coachman is his dwelling-house, although the principal use of the building is that of a coach-house and stable.¹ And a storehouse connected with a dwelling-house by an uninclosed gallery is a part of the dwelling-house.²

§ 175. **May be Several Dwellings in Same Building.** — Where a building is leased to different persons in distinct apartments, each apartment is the dwelling-house of the lessee.³

§ 176. **Public Building may be a Dwelling.** — A suite of rooms in a college is a dwelling-house.⁴ So is a public jail,⁵ or an infirmary.⁶ And a

¹ *R. v. Turner*, 1 Leach (Eng. C. C.) 305.

² *Spears v. State*, 92 Miss. 613, 46 So. 166.

³ *Stedman v. Crane*, 11 Metc. (Mass.) 295.

⁴ *Barnes v. Peters*, L. R. 4 C. P. 539.

⁵ *People v. Cowteral*, 18 Johns. (N. Y.) 115.

⁶ *Davis v. State*, 38 Ohio St. 506.

building thirty-six feet distant from the main dwelling, in which the servants sleep, is a part of the dwelling-house.¹

§ 177. **Combined Residence and Place of Business.** — Where the front of a building is occupied by the owner as a shoe-shop, and is connected with the rear and overhead portion, which is used as a dwelling, the building is a dwelling-house.² And where a woman occupied as her dwelling a building containing a single room, in which she also carried on her trade as a milliner, and kept therein a stock of millinery goods, it was held that the use of the room as a place of business did not change its character as a dwelling, and that breaking the door in the execution of civil process was illegal.³

§ 178. **Use of House must be Primarily and Habitually for Sleeping Purposes.** — The house must be used as the usual and habitual place for sleeping purposes, by the owner or some member of his family, or his servants, in order to make it a dwelling-house.

A storehouse of the owner, who resides near by,

¹ *Pond v. People*, 8 Mich. 150.

² *People v. Dupree*, 98 Mich. 26, 56 N. W. 1046.

³ *Welsh v. Wilson*, 34 Minn. 92, 24 N. W. 327.

and in which he *occasionally* slept, is not a dwelling-house.¹ But if a part of a storehouse, communicating with the part used for store purposes, is slept in *habitually* by the owner or some member of his family, although he sleeps there for the purpose of protecting the premises, it is his dwelling-house. If, however, the person who sleeps there is not the owner, or one of his family, or a servant, or clerk, but is employed to sleep there *solely* for the purpose of protecting the premises, the store is not a dwelling-house.²

§ 179. **Effect of Absence.**—A house which the owner visits once or twice a year, and at each visit sleeps there for about a week, at other times the house being unoccupied, is not a dwelling-house except when so occupied.³ But a temporary absence with the intention of returning does not make a building lose its character as a dwelling-house.⁴

¹ State v. Jenkins, 5 Jones (N. C.) 430.

² State v. Potts, 75 N. C. 129; State v. Williams, 90 N. C. 724.

³ Scott v. State, 62 Miss. 781.

⁴ Harrison v. State, 74 Ga. 801; Schwabacher v. People, 165 Ill. 618, 46 N. E. 809; *Ex parte* Vincent, 26 Ala. 145.

WHAT IS A BREAKING?

§ 180. **Same in Serving Process as in Burglary.** — What would be a “breaking” of the outer door in burglary is equally a breaking by the sheriff when he enters to make a levy,¹ or when he, or any other officer, comes to serve any legal process.

§ 181. **Does not Necessarily Involve Injury of Material.** — “Breaking” does not mean that any part of the material used in the construction of a door, or window, or any other part of the house must be actually broken or even injured. If anything material which constitutes a part of the dwelling-house, and is relied on as a security against intrusion, be broken, removed, or put aside, there is a breaking.²

The tendency of the courts of late, has been to hold that but the slightest force is necessary to constitute a breaking. In a recent Michigan case the following rule was laid down: “If any force at all is necessary to effect an entrance into a building, through any place of ingress, usual

¹ *Curtis v. Hubbard*, 1 Hill (N. Y.) 338.

² *State v. Boon*, 35 N. C. 244; *Walker v. State*, 52 Ala. 376.

or unusual, whether open, partly open, or closed, such entrance is a breaking.”¹

§ 182. **Taking Advantage of Negligence of Occupant.** — But if the occupant of a house is negligent, and does not avail himself of the usual methods of protecting his dwelling, then one who takes advantage of his negligence is not guilty of breaking.² But it has been held that pushing up a window held by its weight only, and left partly open, is a breaking.³

§ 183. **Breaking Doors.** — Opening a door by lifting the latch,⁴ or by turning the knob of a closed door is, in law, a complete breaking.⁵ Or opening a door by unhooking a chain which is hooked over a nail,⁶ or to push open a door which

¹ *People v. White*, 153 Mich. 617, 117 N. W. 161, where it was held that the further opening of a window, already partly open, was a breaking.

² *State v. Henry*, 9 Ired. (N. C.) 463; *R. v. Spriggs*, 1 Mood. & Rob. (Eng. N. P.) 357.

³ *People v. White*, 153 Mich. 617, 117 N. W. 161.

⁴ *State v. Groning*, 33 Kan. 18, 5 Pac. 446; *State v. O'Brien*, 81 Iowa 93, 46 N. W. 861; *Hedrick v. State*, 40 Tex. Cr. 532; *State v. Boon*, 35 N. C. 244; *Tickner v. People*, 6 Hun (N. Y.) 657; *State v. Hecox*, 83 Mo. 531; *Bass v. State*, 69 Tenn. 444; *McCourt v. People*, 64 N. Y. 583. ⁵ *Walker v. State*, 52 Ala. 376.

⁶ *State v. Hecox*, 83 Mo. 531.

is entirely closed, but which is neither locked nor latched, is a sufficient breaking.¹ So where a door was made in two sections, upper and lower, the upper section being open, it is a breaking to unhook the lower door; and the fact that the upper door was open, so that the party might have entered without unfastening the lower door, makes no legal difference in the entry.² And where a screen door, entirely closed, was pushed open, although the permanent door was not closed, it was held a breaking.³ And also pushing open a screen door held shut by springs is a breaking.⁴ And even if fitting so closely in its frame as to require strength to open it, the opening thereof is a breaking.⁵

The removing of a post leaning against a door to keep it closed also constitutes a breaking.⁶ And the outer door being shut, is equally a protection whether the owner or possessor be within

¹ *State v. Reid*, 20 Iowa 413; *State v. Groning*, 33 Kan. 18, 5 Pac. 446.

² *Ferguson v. State*, 52 Neb. 432, 72 N. W. 590.

³ *State v. Conners*, 95 Iowa 485, 64 N. W. 295.

⁴ *State v. Henderson*, 212 Mo. 208, 110 S. W. 1078.

⁵ *Collins v. Com.*, 146 Ky. 698, 143 S. W. 35.

⁶ *State v. Powell*, 61 Kan. 81, 58 Pac. 968; *State v. Woods*, 137 Mo. 6, 38 S. W. 722; *Matthews v. State*, 38 S. W. (Tex.) 172.

at the time or not.¹ Raising a trap door which is held in place by its own weight is also a breaking.²

§ 184. **Breaking Windows.** — And it is a breaking within the meaning of the law even to push open a swinging transom window, which is not fastened, but is kept in place merely by its own weight,³ or raising an unfastened window,⁴ or removing a window screen that is fastened with nails,⁵ or any other window covering, even if held in place by its weight alone.⁶

§ 185. **Entering other Openings.** — Entering by means of a chimney⁷ is a breaking, because this is an opening which necessarily exists in order that the building may be occupied as a dwelling-house.

¹ *Curtis v. Hubbard*, 1 Hill (N. Y.) 338.

² *Harrison v. State*, 20 Tex. App. 387; *Carter v. State*, 68 Ala. 96.

³ *Dennis v. People*, 27 Mich. 151; *Timmons v. State*, 34 Ohio St. 426.

⁴ *State v. Boon*, 35 N. C. 244; *Frank v. State*, 39 Miss. 705; *R. v. Hyams*, 7 C. & P. (Eng. N. P.) 441.

⁵ *Com. v. Stephenson*, 8 Pick. (Mass.) 354; *Sims v. State*, 136 Ind. 358, 36 N. E. 278.

⁶ See also §§ 181, 182, *supra*.

⁷ *R. v. Brice*, Russ. & Ry. (Eng. C. C.) 450; *Walker v. State*, 52 Ala. 376.

But it seems that it is not a breaking to enter through a hole in the roof of a house, left there for the purpose of giving light,¹ because the owner might have protected his premises by covering the opening with a fastened window; or to enter by a door or window which is already partly opened, although the opening may be very slight.²

In all such cases the negligence of the occupier, in leaving his premises insufficiently protected, reduces an illegal entrance to a mere trespass, without attaching to it a breaking.

§ 186. **Enlarging Opening by Actual Breaking.** — But where an opening is enlarged by an actual breaking of material, or even where a broken window-pane, still entirely in place, is removed so as to effect an entrance, or the breaking or pushing in of a part of a pane of glass which had been previously cut, but the whole of which still remained in its place,³ is a sufficient breaking.

So where a hole is dug under a building made of logs, which has no floor except the ground, there is a breaking.⁴

¹ *R. v. Spriggs*, 1 Mood. & Rob. (Eng. N. P.) 357.

² *Com. v. Strupney*, 105 Mass. 588. But see §§ 181, 182, *supra*.

³ *R. v. Bird*, 9 C. & P. (Eng. N. P.) 44.

⁴ *Pressley v. State*, 111 Ala. 34, 20 So. 647.

§ 187. **Mere Protective Doors are not "Outer" Doors.** — Where there are two doors to the cellar-way of a dwelling-house, one opening outwardly, and the other opening into the cellar, the latter is the outer door of the house, and if closed and latched, the unlatching and entering constitutes a breaking.¹ Upon like reasoning the storm-door is not the outer door of a house.²

§ 188. **Removal of Iron Grating over Sidewalk.** — One decision apparently in conflict with the last cited case is, that the removal of an iron grating over the sidewalk, for the purpose of effecting an entrance through a cellar window into the building, is a breaking.³ But in this case it seems that the cellar window was left open by the owner, who apparently relied upon the grating to protect the building against intruders, and this allows the cases to be reconciled.

§ 189. **Entrance by Means of Deception.** — To gain an entrance by deception, as where the officer announced that he had a note for the party whose arrest was sought,⁴ or that he wanted to see some other person who was in the house, and thereby

¹ *McCourt v. People*, 64 N. Y. 583. ² *Ibid.*

³ *People v. Nolan*, 22 Mich. 229.

⁴ *R. v. Backhouse, Lofft* (Eng. K. B.) 61.

gained admission,¹ have been held legal entrances, although such entrances in the law of burglary are held breakings.² And where the occupant of a house, decoyed therefrom by stratagem of the trespasser, left his door unfastened, and fifteen minutes later the trespasser entered the unfastened door, there was no breaking, by reason of the negligence of the remaining members of the family not fastening the door during that interval.³

But if the occupant is induced to open the door by threats, or if the officer claims that he is coming to serve a different sort of a process, and by his false statement procures an entrance, there would be a breaking.

§ 190. Effect of Illegal Breaking on the Arrest.

— An arrest of a person in a civil action, by an unlawful breaking, not only subjects the officer to a civil action for the trespass, but the arrest is altogether void.⁴ In a criminal action, however, the illegality of the arrest will not be considered in that case.⁵

¹ *Hitchcock v. Holmes*, 43 Conn. 528.

² *Johnston v. Com.*, 85 Pa. St. 54.

³ *State v. Henry*, 9 Ired. (N. C.) 463.

⁴ *Kerbey v. Denbey*, 1 M. & W. (Eng. Exch.) 336.

⁵ *Com. v. Conlin*, 184 Mass. 195, 68 N. E. 207.

See also § 25, *supra*.

CHAPTER VIII

FORCE IN THE ACT OF ARREST

§ 191. **Authority and Duty are Coincident.** — **Force.** — **Killing.** — The law never clothes a person with authority to make an arrest without, at the same time, placing upon him the *duty* of making it.

In the discharge of this duty, the arresting party may use all the force that is absolutely necessary to effect the arrest, even under some circumstances to the point of killing; but the use of unnecessary force can never be justified.

The law deprecates the necessity of killing a human being in the act of making an arrest, and will not allow either the party making the arrest, or the party whose arrest is desired, in case of a wanton abuse of right, to shield himself behind a technicality of law.

So that, while there are cases holding that the taking of life by the officer, or by the accused, or by a private party in a case wherein he may lawfully act, is justifiable under certain circumstances,

these cases may not always be safely relied upon to protect the party who does the killing.

This is largely true by reason of the different views held by the people of different parts of the country respecting the amount of provocation that will justify a homicide, — the killing of a human being by a human being. And it is always the people — the jury — of the place where the homicide occurs that are to say whether the killing is to be sanctioned or punished, and whether the officer acted on reasonable grounds.¹ Hence, a case decided in a community where oral or written insults and provocations are held, under certain conditions, to justify a killing, is not a safe precedent for one to rely on in a community where mere words, no matter how strongly inclined to arouse man's passions, are held never to justify a homicide. In fact, with the advancement of legal attainments, and general enlightenment of society, the occasions where the taking of human life may be justified by one enforcing legal arrest, or resisting illegal arrest, are becoming fewer.

§ 192. **Blackstone's Rule not Reliable.** — Blackstone wrote, about 1769, that a crime might be

¹ State v. Bland, 97 N. C. 438, 2 S. E. 460.

prevented by death if the same, if committed, would be punished by death. But this rule does not now hold good, because at that time all felonies were punishable by death, whereas now but few are so punishable; while in some States the death penalty is altogether abolished.

§ 193. **Officer may use all Necessary Force.**—It may be said that an officer whose duty it is to make an arrest may use all force that is necessary in making the arrest, even to the point of taking life,¹ *when there is no other way of making the arrest*, and it makes no difference whether the process is civil or criminal.² He may act in self-

¹ *State v. Dierberger*, 96 Mo. 666, 10 S. W. 168; *Brooks v. Com.*, 61 Pa. St. 352; *Head v. Martin*, 85 Ky. 480, 3 S. W. 622; *Mesmer v. Com.*, 26 Gratt. (Va.) 976; *State v. Miller*, 5 Ohio Dec. 703; *Shovlin v. Com.*, 106 Pa. St. 369; *James v. State*, 44 Tex. 314; *Golden v. State*, 1 S. C. 292; *State v. Sigman*, 106 N. C. 728, 11 S. E. 520; *Patterson v. State*, 91 Ala. 58, 8 So. 756; *Ramsey v. State*, 92 Ga. 53, 17 S. E. 613; *Murdock v. Ripley*, 35 Me. 472; *State v. Lafferty*, 5 Harr. (Del.) 491; *People v. Durfee*, 62 Mich. 487, 29 N. W. 109; *State v. Fuller*, 96 Mo. 165, 9 S. W. 583; *People v. Carlton*, 115 N. Y. 618, 22 N. E. 257; *U. S. v. Fullhart*, 47 Fed. (U. S.) 802; *Dixon v. State*, 12 Ga. App. 17, 76 S. E. 794; *B. & O. R. Co. v. Strube*, 111 Md. 119, 73 Atl. 697.

² *Clements v. State*, 50 Ala. 117.

defense when attacked, but has no right to retaliate with excessive force.¹ And abusive language used by a prisoner will not justify an assault by an officer having him in charge.²

Where the person arrested forcibly carries the officer outside his jurisdiction he is still in lawful custody of the officer and is entitled to the protection due a prisoner.³

§ 194. **May not use Unnecessary Force.** — But it is his duty to use no unnecessary harshness or violence;⁴ and if he use more force than is necessary, he himself becomes liable in trespass,⁵ and in case of taking life may be guilty of manslaughter, or even murder,⁶ according to the de-

¹ *Petit v. Colmery*, 4 Penn. (Del.) 266.

² *Dixon v. State*, 12 Ga. App. 17, 76 S. E. 794.

³ *Bowlin v. Archer*, 157 Ky. 540, 163 S. W. 477.

⁴ *Fulton v. Staats*, 41 N. Y. 498; *North v. People*, 139 Ill. 81, 28 N. E. 966; *Findlay v. Pruitt*, 9 Port. (Ala.) 195; *Lander v. Miles*, 3 Oreg. 35; *Burns v. State*, 80 Ga. 544, 7 S. E. 88; *State v. Pate*, 7 Ohio N. P. 543; *Reneau v. State*, 2 Lea (Tenn.) 720; *State v. Mahon*, 3 Harr. (Del.) 568; *Skidmore v. State*, 43 Tex. 93.

⁵ *Murdock v. Ripley*, 35 Me. 472; *Golden v. State*, 1 S. C. 292; *Patterson v. State*, 91 Ala. 58, 8 So. 756; *Dilger v. Com.*, 88 Ky. 550, 11 S. W. 651.

⁶ *Williams v. State*, 44 Ala. 41; *State v. Bryant*, 65 N. C. 327; *Reneau v. State*, 2 Lea (Tenn.) 720; *State v. Dietz*, 59 Kan. 576, 53 Pac. 870.

gree of wantonness and recklessness of human life manifested in the homicide.

If no resistance be offered, or attempt to escape, he has no right, rudely and with violence, to seize and collar his prisoner.¹ If one be arrested with unlawful violence in the first instance, yet submits to the arrest, and afterward while in peaceful custody forcibly attacks the officer, such attack is a resistance of a peace officer.²

§ 195. May use Force to prevent Escape. — Felony. — Any force which may be used to effect an arrest may also be used to prevent an escape and retain custody of the prisoner, and an officer attempting to arrest a person guilty of a felony, at least of the more atrocious kind, may kill to prevent an escape either before or after the arrest when there is no other way of preventing it.³

It has been wisely held that this doctrine does not apply to all felonies, but only to those of a more atrocious kind, as rape and murder; therefore it was held that one was not justified in shoot-

¹ *State v. Mahon*, 3 Harr. (Del.) 568.

² *State v. Dennis*, 2 Marv. (Del.) 433, 43 Atl. 261.

³ 1 Hale's P. C. 481; 4 Bl. Com. 293; *Jackson v. State*, 66 Miss. 89, 5 So. 690.

ing to prevent the escape of one who had stolen a hog,¹ and who made no actual resistance to the arrest.

§ 196. **Misdemeanor.**—With much stronger reason would the right to kill not exist in preventing an escape in case of a misdemeanor;² such killing would be murder.³ And it has been held that an officer has no right, when endeavoring to execute a warrant on a bastardy charge, to shoot the accused when fleeing, either to effect his arrest or to prevent his escape.⁴ A party guilty of a misdemeanor, fired upon by an officer

¹ *State v. Bryant*, 65 N. C. 327.

² *Tiner v. State*, 44 Tex. 128; *Williams v. State*, 44 Ala. 41; *Thomas v. Kinkead*, 55 Ark. 502, 18 S. W. 854; *Head v. Martin*, 85 Ky. 480, 3 S. W. 622; *Rischer v. Meehan*, 11 Ohio C. C. 403; *U. S. v. Clark*, 31 Fed. (U. S.) 710; *Brown v. Weaver*, 76 Miss. 7, 23 So. 388; *Conraddy v. People*, 5 Park. Cr. (N. Y.) 234; *Reneau v. State*, 2 Lea (Tenn.) 720; *Forster's Case*, 1 Lewin (Eng. C. C.) 187; *Handley v. State*, 96 Ala. 48, 11 So. 322; *Com. v. Greer*, 20 Pa. Co. Ct. 535; *Dilger v. Com.*, 88 Ky. 550, 11 S. W. 651; *Wright v. State*, 44 Tex. 645; *Holmes v. State*, 5 Ga. App. 166, 62 S. E. 716; *State v. Cunningham*, — Miss. —, 65 So. 115. *Contra*: *State v. Dierberger*, 96 Mo. 666, 10 S. W. 168.

³ *Reneau v. State*, 2 Lea (Tenn.) 720; *State v. Dietz*, 59 Kan. 576, 53 Pac. 870.

⁴ *Head v. Martin*, 85 Ky. 480, 3 S. W. 622.

while avoiding arrest, may repel the attack by shooting the officer, and the killing will not necessarily be unlawful.¹

§ 197. **Fleeing from Arrest.** — There is a broad distinction between resisting arrest and the avoidance of it; between forcible opposition to arrest and merely fleeing from it; and there is no rule of law that he who flees from attempted arrest in case of misdemeanor thereby forfeits his right to defend his life.²

Even in case of one charged with murder, so long as the one sought to be arrested was content peaceably to avoid arrest, the pursuing party had no right to kill him; but whenever, by his conduct, he puts in jeopardy the life of any attempting to arrest him he may be killed, and the act will be excusable.³

§ 198. **Officer is liable for Excessive Force.** — In any case, a felon must not be killed in endeavoring to effect his capture, if the officer can arrest him without such severity, by obtaining assist-

¹ *Tiner v. State*, 44 Tex. 128.

² *Ibid.*; *Roberson v. United States*, 4 Okla. Cr. App. 336, 111 Pac. 984; *McAllister v. State*, 7 Ga. App. 541, 67 S. E. 221.

³ *State v. Anderson*, 1 Hill (S. C.) 327.

ance, or otherwise, of which the jury ought to inquire.¹

The amount of force which an officer may lawfully use in making an arrest is so much as is necessary to accomplish his object; and where he is charged with exceeding that limit, the jury must judge of the necessity and not the officer.² If the amount used is more than the occasion requires, he is criminally liable for the excess.³ So where a police officer is endeavoring to arrest a drunken cab driver, he has no right to strike him with his club in such a manner as to break his arm, and an indictment will lie for the assault and battery.⁴

And where an officer makes an arrest of an offender, whom he finds taking a meal at a public hotel, by rudely seizing him and throwing him

¹ *Williams v. State*, 44 Ala. 41.

² *State v. Bland*, 97 N. C. 438, 2 S. E. 460.

³ *Patterson v. State*, 91 Ala. 58, 8 So. 821; *State v. Fuller*, 96 Mo. 165, 9 S. W. 583; *State v. Lafferty*, 5 Harr. (Del.) 491; *Golden v. State*, 1 S. C. 292; *State v. Mahon*, 3 Harr. (Del.) 568; *Mesmer v. Com.*, 26 Gratt. (Va.) 976; *Ramsey v. State*, 92 Ga. 53, 17 S. E. 613; *Beaverts v. State*, 4 Tex. App. 175; *Mockabee v. Com.*, 78 Ky. 380; *Murdook v. Ripley*, 35 Me. 472; *Bowling v. Com.*, 7 Ky. L. 821; *Dilger v. Com.*, 88 Ky. 550, 11 S. W. 651.

⁴ *Golden v. State*, 1 S. C. 292.

violently to the floor, then striking him with the butt of his pistol and knocking him senseless, no evidence having been adduced to show occasion for use of such force, the officer was properly found guilty of assault.¹

§ 199. **Officer's Right to use Club.** — Where an officer whose duty it was on a public occasion to see that a passage was kept for the passing of vehicles, directed a person in front of the crowd to stand back, and on being told by him that he could not for those behind him, struck him immediately on the face, without any other effort to remove him, saying that he would make him stand back, it was held that the officer exceeded his authority and should have confined himself to pressure.²

Where an officer finds two persons fighting, and, grasping one by the shoulder, tells him that he is under arrest, if the prisoner still continues to strike at his opponent, the officer may be justified in striking him with his club in order to stop the fight, if he uses no unnecessary force in doing so.³

¹ *Beaverts v. State*, 4 Tex. App. 175.

² *Imason v. Cope*, 5 C. & P. (Eng. N. P.) 193.

³ *State v. Pugh*, 101 N. C. 737, 7 S. E. 757.

But an officer is not justified in striking one with his club who interferes with him in the performance of his duty, although he would be justified in placing him under arrest.¹ Nor has an officer the right to strike with his club one who merely holds back, and is not otherwise resisting.²

§ 200. **Demanding Officer's Number.** — Any citizen has a right to demand of a police officer his number, and the demanding of the number of an officer is no crime, nor is the temporarily standing in front of him for that purpose. And where a party remonstrates with an officer for making an arrest, or demands his number, he is not guilty of obstructing an officer.³ But if the remonstrance be carried to a point where the prisoner is incited to resist, there will be an offense,⁴ for which the officer may arrest the inciting party.⁵

§ 201. **Officer's Unlawful Act deprives him of Protection.** — If an officer has brought peril upon himself by his own unlawful act, either in making

¹ *Levy v. Edwards*, 1 C. & P. (Eng. N. P.) 40.

² *Com. v. Weathers*, 7 Kulp (Pa.) 1.

³ *Com. v. The Sheriff*, 3 Brewst. (Pa.) 343. ⁴ *Ibid.*

⁵ *White v. Edmunds*, 1 Peake (Eng. N. P.) 89.

the arrest, or in the treatment of his prisoner while under arrest, he will not be justified in taking the life of his prisoner on the ground of self-defense.¹

And if there is no attempt to escape, and no forcible resistance, it is an excess of authority and a criminal offense, which may well be called an outrage in an officer, to inflict any blow or other violence upon his prisoner; and the prisoner is justified in using any force not excessive in defending himself from the unauthorized assault.²

§ 202. **Officer detailed as Guard.** — Where an officer is detailed to protect a judge or other person, it is his duty to see that no harm comes to the person under his charge; and if the circumstances are such that he may reasonably believe that killing of a person attempting to assault the one under his care is necessary for the safety of his charge, he is justified in taking the life of the assailant.³

§ 203. **Misuse of Handcuffs.** — Because an officer is responsible for the safe-keeping of his

¹ *Com. v. Weathers*, 7 Kulp (Pa.) 1.

² *State v. Belk*, 76 N. C. 10.

³ *In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. ed. 55.

prisoner, and may become liable either civilly or criminally for his escape, the law leaves the question of necessity in the use of handcuffs largely to the discretion of the officer, and holds him liable only for a clear abuse of his authority.¹

So where an officer handcuffed one charged with a misdemeanor to one convicted of a felony, and walked them thus together through the streets, he was held liable for the abuse of his authority.²

Where a warden of a prison ordered the arrest of one conveying tobacco to a prisoner in violation of law, and the officer making the arrest without a warrant handcuffed the accused and led him thus through the public streets of Toronto to the police station it was held that the handcuffing was not justifiable and that the officer was liable in trespass, although the warden was not liable as the evidence did not show he was a party to it.³

And an officer who has arrested a defendant

¹ *Dehm v. Hinman*, 56 Conn. 320, 15 Atl. 741; *Wright v. Court*, 4 B. & C. (Eng. K. B.) 596; *Leigh v. Cole*, 6 Cox C. C. 329; *Firestone v. Rice*, 71 Mich. 377, 38 N. W. 885; *Cochran v. Toher*, 14 Minn. 385; *State v. Stalcup*, 24 N. C. 50. But see *Giroux v. State*, 40 Tex. 97.

² *Leigh v. Cole*, 6 Cox C. C. (Eng.) 329.

³ *Hamilton v. Massie, et al.*, 18 O. R. (Can.) 585.

in a civil suit, or a person accused of a crime, has no right to handcuff him unless it is reasonably necessary, or he has attempted to make his escape.¹ And, without some good reason, a prisoner must not be brought shackled into court.²

¹ *Wright v. Court*, 4 B. & C. (Eng. K. B.) 596.

² *State v. Kring*, 64 Mo. 591; *Faire v. State*, 58 Ala. 74; *People v. Harrington*, 42 Cal. 165; *Lee v. State*, 51 Miss. 566.

CHAPTER IX

DISPOSING OF THE PRISONER

§ 204. **Officer's Duty after Arrest. — Confining Prisoner.** — After an arrest has been made, the next duty of the arresting party is to have his prisoner before a magistrate,¹ in order that the offense with which the prisoner is charged may be inquired into. To this effect the prisoner may be confined in the most suitable place, for a reasonable time, until it is possible for him to be taken before the magistrate. The length of time during which this confinement may continue lawful will vary according to the circumstances of the case, but it may be laid down as a general rule that it must continue no longer than the exigencies of the case absolutely demand, and any further delay will make the officer guilty of false imprisonment.²

§ 205. **Detention. — Unconstitutional Law is no Protection to Officer.** — So where a town by-

¹ See § 96, *supra*; *Kindred v. Stitt*, 51 Ill. 401.

² *Burke v. Bell*, 36 Me. 317; *Cochran v. Toher*, 14 Minn. 385.

law authorized an officer to arrest and detain without warrant for the space of forty-eight hours, it was held that such law was repugnant to the general law of the State, and therefore void, and that in an action for trespass, the officer could not justify his acts under that law.¹ And where the detention was for five days, it was unreasonable, as a matter of law, and should not have been left to the jury to consider as a matter of fact.²

§ 206. **Termination of Officer's Control.** — When an officer has made an arrest under a warrant, his custody of the prisoner does not cease until the prisoner has been discharged, admitted to bail, or committed to jail upon a mittimus issued by the court,³ and it is his duty to exercise such control over the prisoner that he may not escape until the discharge, admission to bail, or commitment has been secured. When the arrest is without warrant, the officer's custody may cease without taking the prisoner before the magistrate, in certain cases, as where he makes an arrest upon suspicion of felony, and the suspicion subsequently disappears,⁴ or where, even

¹ *Burke v. Bell*, 36 Me. 317.

² *Cochran v. Toher*, 14 Minn. 385.

³ *Com. v. Morihan*, 4 Allen (Mass.) 585.

⁴ *Burke v. Bell*, *supra cit.*

in case the statute commands that the officer take his prisoner before the magistrate, the express waiver of this right by the prisoner will justify the officer in discharging him for good reason.¹

§ 207. **Use of Handcuffs.** — To get his prisoner to a suitable place of confinement, or before the magistrate, he may use all force that is reasonably necessary, and he may handcuff his prisoner whenever it may reasonably appear to him to be necessary to do so in order to retain his custody of the prisoner,² even though it should subsequently be shown that the act of handcuffing was entirely unnecessary.³

The right to handcuff must depend on the circumstances of each particular case, considering the nature of the charge, and the conduct and temper of the person in custody.⁴

In order to justify an officer in handcuffing a prisoner arrested for a felony, it is not necessary that he should be unruly, or attempt to escape, or

¹ *Brook v. Stimson*, 108 Mass. 520; *Phillips v. McFadden*, 125 Mass. 198.

² *Dehm v. Hinman*, 56 Conn. 320, 15 Atl. 741; *State v. Stalcup*, 2 Ired. (N. C.) 50.

³ *Firestone v. Rice*, 71 Mich. 377, 38 N. W. 885.

⁴ *Leigh v. Cole*, 6 Cox C. C. (Eng.) 329.

to do anything indicating a necessity for such restraint, nor in the absence of these indications that he should be a *notoriously* bad character.¹

Where friends of the prisoner threaten to release him by force, the officer may be justified in placing his prisoner in irons immediately after the threats are made.²

§ 208. **Right to take Prisoner through Streets in Scanty Attire.** — If a person legally arrested, even by a private person without a warrant, is not sufficiently attired, and after an opportunity to clothe himself is given him, he refuses to put on clothing, he may be taken, if necessary, through the public street without the usual attire, and delivered thus to the proper authority.³

But if the prisoner does not refuse to be comfortably clothed it is unlawful to subject him to the discomfort of insufficient clothing. Any cruel or unnecessary exposure of the person to cold or deprivation of suitable clothing or covering while in the custody of the officer arresting him, is unlawful and renders the officer liable.⁴

¹ *Firestone v. Rice*, 71 Mich. 377, 38 N. W. 885.

² *Cochran v. Toher*, 14 Minn. 385.

³ *Handcock v. Baker*, 2 B. & P. (Eng. C. P.) 260.

⁴ *Petit v. Colmery*, 4 Penn. (Del.) 266.

§ 209. **Searching the Prisoner.** — Except in self-protection, an officer has no right to search a person and seize anything upon him unless he has first arrested him.¹ After the arrest he has a right to search the prisoner for the purpose of taking from him anything that may be used as evidence in prosecuting him,² or anything that may be used by the prisoner in escaping, or to injure either himself or others, but there exists no right to remove from the prisoner his money or any other valuables that may be used by him in providing for his defense.³ And the court may order restored to the accused articles taken possession of by the police, which are not connected with the offense charged, and are not required for evidence.⁴

In an important English case it was said by

¹ *People v. Beach*, 49 Colo. 516, 113 Pac. 513.

² *Spalding v. Preston*, 21 Vt. 9; *O'Connor v. Backlin*, 59 N. H. 589; *Ex parte Hurn*, 92 Ala. 102, 9 So. 515; *Reifsnyder v. Lee*, 44 Iowa 101; *Dillon v. O'Brien*, 16 Cox C. C. (Eng.) 245; *People v. Beach*, 49 Colo. 516, 113 Pac. 513; *Getchell v. Page*, 103 Me. 387, 69 Atl. 624.

³ *Stuart v. Harris*, 69 Ill. App. 668; *Rickers v. Simeox*, -1 Utah 33; *Hubbard v. Garner*, 115 Mich. 406, 73 N. W. 390. *Contra*: *O'Connor v. Backlin*, 59 N. H. 589; *Commercial Exch. Bank v. McLeod*, 65 Iowa 665, 22 N. W. 919.

⁴ *Ex parte MacMichael*, 7 C. C. C. (Can.) 549.

Justice Patterson: "The prisoner complains that his money was taken from him, and that he was thereby deprived of the means of making his defence. Generally speaking, it is not right that a man's money should be taken away from him, unless it is connected in some way with the property stolen. If it is connected with the robbery, it is quite proper that it should be taken. But unless it is, it is not a fair thing to take away his money which he might use for his defence. I believe constables are too much in the habit of taking away everything they find upon a prisoner, which is certainly not right. And this is a rule which ought to be observed by all policemen and other peace officers."¹

In self-protection, however, where an officer at the scene of a crime questions a person as to his identity, and the person refuses to answer but offers to go to the police station, the officer may search the person for concealed weapons when accepting his offer even though he makes no arrest.²

Taking from a person things evidencing crime is not in violation of the constitutional provision against illegal searches and seizures.³

¹ *R. v. O'Donnell*, 7 C. & P. (Eng. N. P.) 138.

² *Gisske v. Sanders*, 9 Cal. App. 13, 98 Pac. 43.

³ *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429.

§ 210. **Removal of Clothing.**—When it becomes necessary to search and take property from the prisoner, all necessary force may be used to accomplish this end,¹ and if necessary the clothing of the prisoner may be removed to complete the search.²

§ 211. **Search may be made at Time of Arrest.**—An officer, at the time of making an arrest, may be justified in searching his prisoner, to protect himself. The mere fact that the prisoner is drunk and disorderly will not justify a searching, but a prisoner may, by violent language and conduct, make such search a reasonable and prudent proceeding.³

§ 212. **Compulsory Physical Examination.**—The right to search does not give the right to make a compulsory physical examination for the purpose of obtaining evidence.⁴

The right to one's person may be said to be a right of complete immunity, — to be let alone;⁵

¹ *Dillon v. O'Brien*, 16 Cox C. C. (Eng.) 245.

² *Woolfolk v. State*, 81 Ga. 551, 8 S. E. 724.

³ *Leigh v. Cole*, 6 Cox C. C. (Eng.) 329.

⁴ *People v. McCoy*, 45 How. Prac. (N. Y.) 216; *Agnew v. Jobson*, 13 Cox C. C. (Eng.) 625; *Blackwell v. State*, 67 Ga. 76.

⁵ *Cooley on Torts*, p. 29.

and further, it has been held that to subject the prisoner to a physical examination against his will, is a violation of the spirit of the Constitution of the United States, Article V, Amendment, which declares that no person shall, in any criminal case, be compelled to be a witness against himself.¹

But an officer may compel the accused to put his foot into a footprint found at the place where the crime was committed, and at the trial testify to the result of the comparison,² or compel the accused to exhibit tattoo marks on his arm for the purpose of identification.³

And where the prisoner, charged with homicide, alleged that her hand, which she had wrapped in bandages, had been burned in her endeavor to put out the fire upon the deceased, she was compelled to unwrap it and show it to a physician, and the examination was held justifiable.⁴

¹ *People v. McCoy*, 45 How. Prac. (N. Y.) 216.

² *State v. Graham*, 74 N. C. 646.

³ *State v. Ah Chuey*, 14 Nev. 79.

⁴ *State v. Garrett*, 71 N. C. 85.

CHAPTER X

ARREST IN EXTRADITION PROCEEDINGS

§ 213. **Extradition and Rendition Distinguished.** — The process of demanding and giving up fugitives from justice, if between nations, is called extradition; if between States of the same nation, is called rendition, although it is very usual to term the process of demanding and giving up fugitives from justice "extradition," whether between States or nations.

§ 214. **Extradition. — Definition.** — Extradition is the surrender by one sovereign State to another, on its demand, of persons charged with the commission of crime within its jurisdiction, that they may be dealt with according to its laws.¹

§ 215. **Matter of Comity.** — Except under the provisions of treaties, the delivery by one country to another, of fugitives from justice, is a matter of comity, and not of obligation;² and a State of

¹ Bouvier's Law. Dict. (Extradition).

² U. S. v. Raucher, 119 U. S. 407, 7 Sup. Ct. 234, 30 L. ed. 425.

the United States cannot regulate the surrender of fugitives from justice to foreign countries, for that province belongs solely to the Federal government.¹

§ 216. **Authority for Issue of Warrant.** — A warrant for an arrest in an extradition proceeding may issue under authority of sections 5270–5280 of the Revised Statutes of the United States, and under the provisions of the Constitution of the United States, Article IV, Amendment.

§ 217. **Magistrates Designated.** — The magistrates authorized by the Revised Statutes, section 5270, to issue such warrants, are the justices of the Supreme Court, circuit judges, district judges, any commissioner authorized by any court of the United States, or a judge of a court of general jurisdiction of any State.

§ 218. **Requisites of Warrant.** — The requirements respecting complaint, oath, and of the warrant itself, are the same as those respecting ordinary warrants. It need not be accompanied by the indictment or affidavit upon which it is based.²

¹ *People v. Curtis*, 50 N. Y. 321.

² *Ex parte Stanley*, 25 Tex. App. 372, 8 S. W. 645; *People v. Donahue*, 84 N. Y. 438.

The warrant must show on its face that the magistrate issuing it is one authorized to act in extradition cases.¹ Such warrant is void, unless it shows on its face that a requisition has been made under the authority of the foreign government, on the government of the United States, and the authority of the latter government obtained, to apprehend such fugitive.² It should also state the offense charged, which must be an offense named in the treaty of extradition. It runs throughout the United States.³

§ 219. **Re-arrest after Discharge on Habeas Corpus.** — If an alleged fugitive be discharged on a writ of *habeas corpus*, he may be immediately re-arrested on a new complaint and warrant.⁴

Upon an extradition charge where an arrest is illegally made on a telegram, without a warrant, it is not necessary first to discharge the prisoner from illegal custody before re-arresting him on a legal process subsequently issued in a criminal matter.⁵

¹ *In re Perez*, 7 Blatchf. (U. S. C. C.) 35. ² *Ibid.*

³ *In re Heinrich*, 5 Blatchf. (U. S. C. C.) 414.

⁴ *In re Macdonnell*, 11 Blatchf. (U. S. C. C.) 170.

⁵ *In re Webber, et al.*, 19 C. C. C. (Can.) 515.

§ 220. Taking before a Magistrate. — Evidence.

— Upon an arrest in an extradition proceeding, the alleged fugitive from justice is to be brought before the official issuing the warrant so that evidence of his criminality may be considered. The degree of evidence must be such that according to the laws of the place where the fugitive is found, it would justify his apprehension and commitment for trial if the crime or offense had been committed there.

§ 221. Delivery of Fugitive to Demanding State.

— If the magistrate deems the evidence sufficient, he will certify the same, together with a copy of the testimony taken before him, to the Secretary of State, and commit the prisoner to jail until the surrender be made, which must be within two calendar months. The Secretary of State will then, upon proper demand being made by the foreign government, order, under his hand and seal of office, in the name and by the authority of the President, the person so committed to be delivered to such person as may be authorized in the name and on behalf of such foreign government to receive him.

§ 222. Scope of Habeas Corpus Writ. — A fugitive about to be returned to the State from which

he fled should be allowed enough time to apply for a writ of *habeas corpus*, in the State of his asylum. But on a writ of *habeas corpus* the guilt or innocence of the prisoner will not be inquired into, for that is exclusively within the province of the courts of the demanding State.¹ The only matters to be inquired into on such writ are whether the proceedings for the extradition have been regular and in compliance with the Constitution and laws of the United States.

§ 223. **Negotiations must be by Highest Executive Officials.** — There can be no extradition or rendition without a demand by the highest executive authority in the State from which the fugitive from justice has fled, upon the highest executive authority of the State in which the fugitive is asylosed. And a warrant to arrest a fugitive in the harboring State must be issued only upon sanction and order of the highest executive official, — the chief magistrate of that State.² The judiciary of the United States possess no jurisdiction in matters of extradition until a demand has been thus made and sanctioned.

¹ *In re Sheldon*, 34 Ohio St. 319; *In re White*, 55 Fed. (U. S.) 54; *Ex parte Devine*, 74 Miss. 715, 22 So. 3.

² *In re Perez*, 7 Blatchf. (U. S. C. C.) 35.

§ 224. **Method of Procedure.** — The usual method of action in extradition cases, is for some police officer, or other special agent, to obtain proper papers in his own country and go with them to a foreign country, and there, with the aid of his government's representative to that country, prosecute his case and return with the fugitive in his custody to the country having jurisdiction of the crime.¹

§ 225. **Matter of Treaty or Comity.** — Although the matter of extradition is usually governed by treaty, it is not necessarily so, for the matter in absence of a treaty rests entirely with the government on which the demand is made, and each government may surrender although no treaty exists. And where a treaty does exist, the country upon which the demand is made, may, through comity, — that is, good will, — deliver up a fugitive from justice for a crime not mentioned in the existing treaty.²

§ 226. **No Comity on Part of United States.** — The United States, however, has always declined to surrender criminals, unless bound by treaty

¹ 8 Op. Atty. Gen. 521.

² *Ex parte Foss*, 102 Cal. 347, 36 Pac. 669.

to do so,¹ and the courts of this country possess no power to arrest and surrender to a foreign country fugitives from justice, except as authorized by treaty stipulations and Acts of Congress passed in pursuance thereof.²

§ 227. **Surrendered Fugitive may be tried only for Crime upon which he was Extradited.** — A fugitive surrendered by a foreign government can only be tried for the crime for which he was extradited,³ until after he has been released from custody and given sufficient opportunity to return to the country from which he was extradited. After sufficient time for this purpose has elapsed, he may be re-arrested and tried for any offense with which he is charged.

§ 228. **Kidnapped Fugitive tried for any Crime.** — But where a fugitive from justice has been kidnapped from a country, between which country and the United States an extradition treaty exists,

¹ *Holmes v. Jennison*, 14 Pet. (U. S.) 540, 10 L. ed. 580.

² *In re Kaine*, 14 How. (U. S.) 103, 14 L. ed. 345.

³ *U. S. v. Watts*, 14 Fed. (U. S.) 130; *U. S. v. Raucher*, 119 U. S. 407, 7 Sup. Ct. 234, 30 L. ed. 425; *Foster v. Neilson*, 2 Pet. (U. S.) 254, 7 L. ed. 416; *Ex parte Hibbs*, 26 Fed. (U. S.) 421; *State v. Vanderpool*, 39 Ohio St. 273; *Com. v. Hawes*, 13 Bush (Ky.) 697.

the prisoner may be tried for an offense not named in the existing treaty,¹ because the United States in the trial of the accused owes no duty to the state from which he was kidnapped, the treaty of extradition not having entered into the incident.

§ 229. **Fugitive in Rendition tried for any Crime.**

— As between the different States of the United States, any fugitive given up in rendition may be tried for the offense named in the requisition, or any other offense not named therein.²

Where a person has been returned in rendition, as a fugitive from justice from another State, and upon trial has been acquitted of the offense charged, he may be at once re-arrested and prosecuted upon another charge, without being given

¹ *Ker v. Illinois*, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. ed. 422.

² *Mahon v. Justice*, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. ed. 283; *Carr v. State*, 104 Ala. 4, 16 So. 150; *Com. v. Wright*, 158 Mass. 149, 33 N. E. 82; *State v. Stewart*, 60 Wis. 587, 19 N. W. 429; *Lascelles v. Georgia*, 148 U. S. 537, 13 Sup. Ct. 687, 37 L. ed. 550; *Lascelles v. State*, 90 Ga. 347, 16 S. E. 945; *State v. Kealy*, 89 Iowa 94, 56 N. W. 283; *People v. Cross*, 135 N. Y. 536, 32 N. E. 246; *In re Miles*, 52 Vt. 609; *State v. Glover*, 112 N. C. 896, 17 S. E. 525. *Contra*: *Ex parte McKnight*, 48 Ohio St. 588, 28 N. E. 1034; *State v. Hall*, 40 Kan. 338, 19 Pac. 918.

an opportunity to return to the State of his previous asylum.¹

But where one has been extradited for an offense which is not a crime, he cannot be detained to answer for another offense until he has had an opportunity to return to the State whence he was extradited.² And one under bail cannot be considered as having an opportunity to return to the State whence he was taken,³ because one under bail cannot be considered as having a right to leave the State in which he is bailed.

§ 230. **Jurisdiction procured by Stratagem.** — A prisoner cannot set up as a ground for discharge that he has been enticed into the State by fraudulent representations,⁴ nor that the extradition proceedings in the other State were irregular,⁵ nor that he was kidnapped and thus brought into the jurisdiction of the trial court.⁶

¹ *Browning v. Abrams*, 51 How. Prac. (N. Y.) 172; *Reid v. Ham*, 54 Minn. 305, 56 N. W. 35. *Contra*: *Compton v. Wilder*, 40 Ohio St. 130.

² *In re Cannon*, 47 Mich. 481, 11 N. W. 280. See also, *Ex parte Slanson*, 73 Fed. (U. S.) 666.

³ *In re Cannon*, *supra cit.*

⁴ *In re Brown*, 4 N. Y. Cr. Rep. 576.

⁵ *In re Miles*, 52 Vt. 609.

⁶ *Ker v. Illinois*, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. ed. 422; *Mahon v. Justice*, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. ed. 283.

So where one was indicted in Kentucky for murder, and escaped to West Virginia, from which State he was forcibly abducted to Kentucky, it was held that the prisoner was not entitled to be discharged from custody under a writ of *habeas corpus* from the Circuit Court of the United States. And the fact that extradition proceedings had been instituted was not material.¹

§ 231. **Constitutional Provisions. — Trivial Offenses.** — Respecting interstate rendition it is provided by the Constitution of the United States, Article IV, Section 2, that "A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, upon demand from the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." The words "treason, felony, or other crimes" cover misdemeanors as well as felonies.² It is, however, safe to say that there will be no rendition for offenses that are too trivial either in financial

¹ *Mahon v. Justice*, 127 U. S. 700, 32 L. ed. 283.

² *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. ed. 250; *In re Greenough*, 31 Vt. 279; *Morton v. Skinner*, 48 Ind. 123; *Com. v. Johnston*, 12 Pa. Co. Ct. 263; *State v. Hudson*, 2 Ohio N. P. 1.

importance, or in moral obliquity, to receive the attention of the executive authority of the State in which the fugitive has taken refuge, to the exclusion of state matters of greater importance.

§ 232. **Arrest may be before Extradition Proceedings are Begun.** — A fugitive from justice may be arrested in the State to which he has fled, even before the rendition proceedings have been started,¹ by making complaint upon oath before the proper magistrate, clearly setting forth the facts constituting the offense.²

§ 233. **Preliminary Proceedings before Requisition.** — Before there can be a requisition or rendition in such interstate matter, there must have been an indictment found, or an affidavit made before a proper magistrate, in the State from which the requisition papers issue, charging the fugitive with treason, felony, or other crime,³ a copy of which indictment or affidavit must be certified as authentic by the Governor of the State from which the fugitive fled, and presented with the requisition papers. Upon the matter being thus properly presented, the executive of

¹ *In re Fetter*, 3 Zab. (N. J.) 311. But see *Malcolmson v. Scott*, 56 Mich. 459, 23 N. W. 166.

² *In re Heyward*, 1 Sandf. (N. Y.) 701.

³ *Ex parte White*, 49 Cal. 433, 11 N. W. 280.

the State to which the fugitive has fled should cause the arrest and detention of the fugitive for a period of not longer than six months, until the agent of the State presenting the requisition may appear.¹

§ 234. **Nature of Crime Charged.** — As the offense charged must be a crime, rendition will not lie for a prosecution in bastardy proceedings.²

The term "other crime," as an extraditable offense, includes statutory as well as common law crimes;³ in fact any offense indictable by the laws of the demanding State may furnish grounds for extradition.⁴

§ 235. **Surrender in Rendition is Obligatory.** — The duty to surrender in rendition, being commanded by the Constitution of the United States, Article IV, Section 2, is obligatory, and does not rest on comity, as in extradition.⁵

§ 236. **Who is a Fugitive from Justice?** — Under a statute providing interstate rendition, a person is a fugitive from justice when he has

¹ Act of Cong. Feb. 12, 1793; Stat. Large, 302.

² *In re Cannon*, 47 Mich. 481.

³ *People ex rel. Jourdan v. Donahue*, 84 N. Y. 438.

⁴ *Brown's Case*, 112 Mass. 409.

⁵ *In re Voorhees*, 32 N. J. 145.

committed a crime within a State, and withdrawn from the jurisdiction of its courts without waiting to abide its consequences,¹ and it matters not that some cause other than a desire to flee induced such withdrawal.²

To warrant the extradition of such fugitive from justice, it is not necessary that he should have left the State wherein the crime was committed for the purpose of avoiding a prosecution, either anticipated or begun, but it is sufficient that having committed an offense which by the laws of the State constitutes a crime, when it comes to subject him to the process of the State to answer for his offense, he has left its jurisdiction and is found within the territory of another State.³ Extradition does not lie for a party who is not a fugitive from justice although he has constructively committed a crime in a State.⁴

¹ *State v. Hall*, 115 N. C. 811, 20 S. E. 729; *In re Voorhees*, 32 N. J. 141; *Hibler v. State*, 43 Tex. 197; *In re White*, 55 Fed. (U. S.) 54.

² *White v. Vallely*, 14 U. S. App. 87, 55 Fed. 54; *In re Block*, 87 Fed. (U. S.) 981; *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. ed. 544; *In re Sultan*, 115 N. C. 57, 20 S. E. 375; *State v. Richter*, 37 Minn. 436, 35 N. W. 9; *In re White*, 55 Fed. (U. S.) 54.

³ *White v. Vallely*, 14 U. S. App. 87, 55 Fed. 54.

⁴ *Wilcox v. Nolze*, 34 Ohio St. 520; *Mohr's Case*, 73 Ala. 503.

CHAPTER XI

EVIDENCE NECESSARY TO ESTABLISH THE OFFENSE

§ 237. **Proof must be Beyond a Reasonable Doubt.** — An officer who, upon his own responsibility, makes an arrest without a warrant, is generally called upon to show that an offense was committed which justified him in arresting the offender.

To establish the crime he has the burden of proving, beyond a reasonable doubt, all the elements which go to make up the offense.¹ And the mere preponderance of evidence is never sufficient to convict one of crime, but a greater degree of proof is necessary, — proof that will not allow a reasonable doubt of the prisoner's guilt to remain in the mind of the court, or of the jury, as the case may be.²

§ 238. **Burden of Proof remains on Prosecutor.** — And this burden remains with him to the end

¹ *Farley v. State*, 127 Ind. 419, 26 N. E. 898; *State v. Rogers*, 119 N. C. 793, 26 S. E. 142.

² *Lee v. State*, 76 Ga. 498; *Gray v. Com.*, 101 Pa. 380.

of the case, for the burden of proof as to the necessity of establishing the ultimate fact to be proved, that is, the fact of the commission of the crime, or the *corpus delicti*,¹ the identity of the prisoner,² and the guilt of the accused never shifts from the prosecution.³

§ 239. **Burden of Giving Evidence may Shift.** —

While the burden of proof in making out a *prima facie* case, where a crime is charged, never shifts from the prosecution, yet where the defendant, instead of producing proof to negative the proof adduced by the prosecution, proposes to show an-

¹ *R. v. Burdette*, 4 B. & Ald. (Eng. K. B.) 95; *State v. Davidson*, 30 Vt. 377; *People v. Palmer*, 109 N. Y. 110, 16 N. E. 529; *Willard v. State*, 27 Tex. App. 386, 11 S. W. 453. The *corpus delicti* cannot be established alone by confessions of the accused; other evidence is necessary. *People v. Hennessey*, 15 Wend. (N. Y.) 147; *Gore v. People*, 162 Ill. 265, 44 N. E. 500; *State v. German*, 54 Mo. 526; *People v. Tarbox*, 115 Cal. 57, 46 Pac. 896; *Attaway v. State*, 35 Tex. Cr. 403, 34 S. W. 112; *Holland v. State*, 39 Fla. 178, 22 So. 298; *Harden v. State*, 109 Ala. 50, 19 So. 494.

² *Winslow v. State*, 76 Ala. 42; *Gore v. People*, 162 Ill. 265, 44 N. E. 500.

³ *People v. Plath*, 100 N. Y. 590, 3 N. E. 790; *Jones v. State*, 51 Ohio St. 331, 38 N. E. 79; *Williams v. People*, 101 Ill. 385; *State v. Harvey*, 131 Mo. 339, 32 S. W. 1110; *Gravely v. State*, 38 Neb. 871, 57 N. W. 751.

other and distinct proposition which avoids the effect of the evidence adduced by the prosecution, there the burden of proof, or rather the burden of giving evidence, does shift, and rests upon the party who proposes to show the latter fact.¹ As where the prisoner endeavors to prove an *alibi*, that being a new and distinct proposition which, if proved, will avoid the effect of the plaintiff's evidence, the burden of proving the *alibi* rests upon the accused.²

§ 240. **Burden of Proof does not Shift.** — Yet even there the burden of proof does not shift in a practical sense, for if the prisoner fails to establish the new and distinct proposition which he interposes in his own defense, and which need only be established by a preponderance of evidence, whatever evidence he does produce to that end must be weighed in the balance, and if upon all evidence produced by both parties, there remains a reasonable doubt of the prisoner's guilt, he must be acquitted,³ for the prisoner

¹ Powers v. Russell, 13 Pick. (Mass.) 69.

² Com. v. Choate, 105 Mass. 451; Carlton v. People, 150 Ill. 181, 37 N. E. 244; State v. Taylor, 118 Mo. 153, 24 S. W. 449; Towns v. State, 111 Ala. 1, 20 So. 598; People v. Pichette, 111 Mich. 461, 69 N. W. 739.

³ Com. v. Choate, 105 Mass. 452; Walters v. State,

is always entitled to the benefit of a reasonable doubt.

§ 241. **Presumption of Innocence.** — While it is a well-established principle of law that “a man is presumed to be innocent until he is found guilty,” this presumption has no effect other than casting upon the State the burden of proving the guilt of the accused beyond a reasonable doubt. It has no weight as evidence in the trial, and although it calls for evidence from the State it is not evidence for the accused.¹

The accused starts into a trial with the presumption of innocence in his favor, and it stays with him until it is driven out of the case by testimony. And whenever the evidence shows beyond a reasonable doubt that the crime as charged has been committed, or that a crime exists, then the presumption of innocence disappears from the case.²

§ 242. **Burden when Charge is Use of Excessive Force.** — Where an officer is on trial charged with

39 Ohio St. 215; *State v. Chee Gong*, 16 Oreg. 534, 19 Pac. 607; *Borrego v. Terr.*, 8 N. M. 446, 46 Pac. 349.

¹ *State v. Smith*, 65 Conn. 285, 31 Atl. 206.

² *Allen v. U. S.*, 164 U. S. 500, 17 Sup. Ct. 154, 41 L. ed. 528. *Contra*: *Farley v. State*, 127 Ind. 421, 26 N. E. 898.

using excessive force in the act of making an arrest, the burden is on the State to show the use of extreme measures. And all the circumstances surrounding the act of arrest should be looked into to determine that question.¹

§ 243. **Burden to show Offense in Officer's Presence.** — Where an officer arrests a person without a warrant, for an offense less than a felony, the burden is on him, when sued in trespass therefor, to show that the offense was in fact committed in his presence.²

§ 244. **Burden to show Authority to Arrest.** — And a person who assumes to arrest another who, when sued in trespass therefor, attempts to justify his act on the ground that he acted as a police officer, must not merely show that he was an officer *de facto*, but that he was an officer *de jure*, that he was legally and duly qualified to act as an officer.³

§ 245. **Burden to show License.** — In an action for selling articles without a license, the bur-

¹ *State v. Dierberger*, 96 Mo. 666, 10 S. W. 168.

² *Shanley v. Wells*, 71 Ill. 78.

³ *Short v. Symmes*, 150 Mass. 298, 23 N. E. 42.

den is upon the defendant to show that he has complied with the law and has a license to sell.¹ But the presumption of innocence is still with the defendant.²

§ 246. **Weight of Evidence on Insanity.** — Respecting the weight of evidence necessary to establish the insanity of the defendant in a criminal case, there are two distinct lines of authority. The weight of authority in this matter seems to be that the defendant in a criminal action has the burden of establishing his plea of insanity only to such an extent as to create a reasonable doubt of his sanity.³ The other view is that the defendant must establish his insanity by a greater degree of evidence, — that which is a preponderance of the testimony.⁴

¹ *Com. v. Holstine*, 132 Pa. St. 357, 19 Atl. 273; *Williams v. People*, 121 Ill. 84, 11 N. E. 881; *Com. v. Thurlow*, 24 Pick. (Mass.) 374; *Liggitt v. People*, 26 Col. 364, 58 Pac. 144; *State v. Sorrell*, 98 N. C. 738, 4 S. E. 630; *State v. Keggon*, 55 N. H. 19; *State v. Shelton*, 16 Wash. 590, 48 Pac. 258; *People v. Curtis*, 95 Mich. 212, 54 N. W. 767; *Birr v. People*, 113 Ill. 647.

² *Com. v. Holstine*, *supra cit.*

³ *Davis v. U. S.*, 160 U. S. 469, 16 Sup. Ct. 353, 40 L. ed. 499.

⁴ *People v. Bemmerly*, 98 Cal. 299, 33 Pac. 263; *Loegrove v. State*, 31 Tex. Cr. 491, 21 S. W. 191.

§ 247. **Evidence of Bad Character.** — Bad character is not admissible to show a disposition to do a particular thing, but may sometimes be offered to throw light on a motive.¹

When character is not itself in issue, evidence of bad character can never be introduced by the prosecution until the prisoner has opened the way by producing evidence of his own good character.² So the fact that the defendant was an ex-convict, having been imprisoned before, was not competent evidence against him, he not having introduced evidence in support of his good character.³ But if the accused takes the stand in his own behalf, his reputation for veracity may be attacked just the same as that of any other witness.⁴

§ 248. **Character Evidence must be General.** — Evidence as to character must be confined to general reputation, and must not touch upon

¹ *People v. McLaughlin*, 150 N. Y. 365, 44 N. E. 1017; *Wright v. State*, 108 Ala. 60, 18 So. 941.

² *State v. Lapage*, 57 N. H. 245; *People v. White*, 14 Wend. (N. Y.) 111; *People v. Fair*, 43 Cal. 137; *State v. Hull*, 18 R. I. 207, 26 Atl. 191; *Young v. Com.*, 6 Bush (Ky.) 312; *State v. Creson*, 38 Mo. 372; *R. v. Rowton*, 10 Cox C. C. (Eng.) 25.

³ *People v. White*, *supra cit.*

⁴ *Com. v. O'Brien*, 119 Mass. 342.

particular acts.¹ And, as a general rule, evidence as to character, when admissible in criminal cases, is to be confined to the particular trait in question.²

§ 249. **Good Character is always Admissible.** — Good character may be shown by the prisoner to establish the improbability of his having committed the crime with which he is charged, and it may be such strong evidence as to create a reasonable doubt in the face of overwhelming facts of guilt.³

¹ *Com. v. O'Brien, supra cit.*; *Com. v. Harris*, 131 Mass. 336; *Stalcup v. State*, 146 Ind. 270, 45 N. E. 334; *State v. McGee*, 81 Iowa 17, 46 N. W. 764; *Evans v. State*, 109 Ala. 11, 19 So. 535; *Garner v. State*, 28 Fla. 113, 9 So. 835; *Basye v. State*, 45 Neb. 261, 63 N. W. 811; *State v. Lapage*, 57 N. H. 245; *Hirschman v. People*, 101 Ill. 574.

² *Clark v. Brown*, 116 Mass. 504.

³ *People v. Van Dam*, 107 Mich. 425, 65 N. W. 277; *Com. v. Wilson*, 152 Mass. 12, 25 N. E. 16; *Com. v. Leonard*, 140 Mass. 473, 4 N. E. 96; *Aneals v. People*, 134 Ill. 401, 25 N. E. 1022; *Hall v. State*, 132 Ind. 317, 31 N. E. 536; *Stewart v. State*, 22 Ohio St. 477; *State v. Schleagel*, 50 Kan. 325, 31 Pac. 1105; *State v. Donohoo*, 22 W. Va. 761; *Parrish v. Com.*, 81 Va. 1; *State v. Ward*, 73 Iowa 532, 35 N. W. 617; *Gibson v. State*, 89 Ala. 121, 8 So. 98; *Hardtke v. State*, 67 Wis. 552, 30 N. W. 723; *Edgington v. U. S.*, 164 U. S. 361, 17 Sup. Ct. 72, 41 L. ed. 468.

§ 250. **Nature of Character Evidence.** — Evidence to prove character may be by the testimony of those who know the character of the party, or by the reputation which the party bears in the community, or by particular conduct. And as the character of a man is subject to a change, it is very material that character evidence relate to the time near when the crime charged was committed.

§ 251. **Conduct as Evidence of Guilt.** — It is competent evidence against the prisoner that he was silent when charged with the crime,¹ or that he destroyed evidence of his guilt,² or marks of ownership,³ or that he took to flight,⁴ concealment, or disguise,⁵ or attempted to stifle investigation, or

¹ *R. v. Smithies*, 5 C. & P. (Eng. N. P.) 332; *Ackerson v. People*, 124 Ill. 572, 16 N. E. 847; *People v. McCrea*, 32 Cal. 98; *Franklin v. State*, 69 Ga. 36. *Contra*: *Com. v. McDermott*, 123 Mass. 440; *Com. v. Walker*, 13 Allen (Mass.) 570; *Com. v. Kenney*, 12 Mete. (Mass.) 235.

² *So. P. R. Co. v. Johnson*, 44 U. S. App. 1, 69 Fed. 559.

³ *Wilson v. U. S.*, 162 U. S. 613, 16 Sup. Ct. 895, 40 L. ed. 1091.

⁴ *State v. Frederic*, 69 Me. 400; *State v. Rodman*, 62 Iowa 456, 17 N. W. 663; *Bell v. State*, 115 Ala. 25, 22 So. 526; *Sewell v. State*, 76 Ga. 836.

⁵ *Com. v. McMahon*, 145 Pa. St. 413, 22 Atl. 971; *State v. Bradneck*, 69 Conn. 212, 37 Atl. 492; *Com. v. Brigham*, 147 Mass. 414, 18 N. E. 167.

possessed the fruits of his crime,¹ or that there are unexplained suspicious appearances, or that he attempted to commit the same crime at another time,² or that he used communicated threats.³

§ 252. Possession of Stolen Goods as Evidence.

— When a theft has been committed, and, immediately after the commission of the crime, the stolen property is found in possession of the party suspected of the theft, it is *prima facie* evidence of the guilt of the person in whose possession the property is found, and unless other circumstances surrounding the case serve to create a reasonable doubt, is sufficient to convict.⁴

¹ *Goon Bow v. People*, 160 Ill. 438, 43 N. E. 593; *Wilson v. U. S.*, *supra cit.*

² Evidence of other offenses or similar acts, is not admissible to show the probability of the accused having committed the offense charged, but is admissible to show a system, knowledge, design or intent. *State v. Lapage*, 57 N. H. 245; 1 *Wigmore Ev.* § 300, *et seq.*

³ *Ward v. State*, 30 Tex. App. 687, 18 S. W. 793; *Ford v. State*, 112 Ind. 373, 14 N. E. 241; *People v. Duck*, 61 Cal. 387; *Painter v. People*, 147 Ill. 462, 35 N. E. 64; *Griffin v. State*, 90 Ala. 596, 8 So. 670; *Linehan v. State*, 113 Ala. 70, 21 So. 497; *Brooks v. Com.*, 100 Ky. 194, 37 S. W. 1043; *State v. Edwards*, 34 La. 1012; *State v. McKinney*, 31 Kan. 570, 3 Pac. 356.

⁴ *Com. v. Randall*, 119 Mass. 107; *Keating v. People*, 160 Ill. 486, 43 N. E. 724; *State v. Walker*, 41 Iowa 217; *Gablick v. People*, 40 Mich. 292.

And if the finding of the property in the possession of the accused is *immediately* after the commission of the offense, it is almost conclusive evidence of his guilt; but the presumption of guilt weakens as time elapses.¹

Although the unexplained possession of property may sometimes justify an arrest on suspicion, the defendant is never bound at his trial to explain the possession of recently stolen property, because the burden of proving the offense beyond a reasonable doubt is on the prosecution.²

§ 253. **Intoxication as a Defense where Specific Intent is Essential.** — Voluntary intoxication is no defense to a criminal charge.³ But where a

¹ *Gablick v. People*, 40 Mich. 292; *Com. v. Montgomery*, 11 Mete. (Mass.) 534; *White v. State*, 72 Ala. 195; *Belote v. State*, 36 Miss. 96.

² *Hoge v. People*, 117 Ill. 44, 6 N. E. 796; *State v. Miner*, 107 Iowa 656, 78 N. W. 679; *Van Straaten v. People*, 26 Col. 184, 56 Pac. 905; *Heed v. State*, 25 Wis. 421; *Smith v. State*, 58 Ind. 340.

³ 4 Bl. Com. 26; 1 Hale's P. C. 32; *Hopt v. Utah*, 104 U. S. 631, 26 L. ed. 873; *State v. Tatro*, 50 Vt. 483; *Crosby v. People*, 137 Ill. 341, 27 N. E. 49; *Shannahan v. Com.*, 8 Bush (Ky.) 463; *State v. West*, 157 Mo. 309, 57 S. W. 1071; *Conley v. Com.*, 98 Ky. 125, 32 S. W. 285; *People v. Miller*, 114 Cal. 10, 45 Pac. 986; *Colee v. State*, 75 Ind. 511; *R. v. Carroll*, 7 C. & P. (Eng. N. P.) 145.

specific intent, that is, an intent to do a certain thing, is a necessary ingredient of the crime charged, intoxication may be set up in defense to show that the specific intent could not exist.¹

For example, a breaking and entering of a dwelling-house in the night-time will not constitute burglary unless at the time of the breaking and entering there exists a specific intent to commit a felony therein, and the intoxication may be of such a degree as to negative the existence of this specific intent.

§ 254. **Confession by Intoxicated Person.** — A confession made by a party who is so intoxicated as not to understand it, is not admissible.²

¹ *R. v. Pitman*, 2 C. & P. (Eng. N. P.) 423; *Com. v. Hagenlock*, 140 Mass. 125, 3 N. E. 36; *Crosby v. People*, 137 Ill. 342, 27 N. E. 49; *Schwabacher v. People*, 165 Ill. 629, 46 N. E. 809; *Com. v. Dorsey*, 103 Mass. 412; *State v. Garvey*, 11 Minn. 154; *Warner v. State*, 56 N. J. L. 686, 29 Atl. 505; *Lancaster v. State*, 2 Lea (Tenn.) 575; *State v. Fiske*, 63 Conn. 388, 28 Atl. 572; *Jenkins v. State*, 93 Ga. 1, 18 S. E. 992; *Pigman v. State*, 14 Ohio 555; *Cline v. State*, 43 Ohio St. 332, 1 N. E. 22; *Hopt v. Utah*, 104 U. S. 631, 26 L. ed. 873; *People v. Walker*, 38 Mich. 156; *Englehardt v. State*, 88 Ala. 100, 7 So. 154; *People v. Young*, 102 Cal. 411, 36 Pac. 770.

² *Com. v. Howe*, 9 Gray (Mass.) 110.

§ 255. **Confession, if not Voluntary, is Inadmissible.** — A confession of the prisoner is not admissible as evidence unless it was voluntarily made, and was not inspired by influence of hope or fear.¹ And the burden as to voluntary character of the confession is on the prosecution.² If the confession was obtained by any promises, or threats, of some one in authority over the accused, it is not admissible.

So where a police officer arrested the defendant for larceny from the person, he said to him: "If you will get the money it will not be used as evidence against you; I want to get back the money." On the next day the defendant confessed to another police officer. It was held that, although the statements of the second officer were admissible, the refusal of the judge at the trial for the offense to instruct the jury that they ought to give no weight to the confession, if they thought it was made under the influence of the inducements, gave the defendant a good ground of exception.³

¹ *Com. v. Culver*, 126 Mass. 464; *Com. v. Burroughs*, 162 Mass. 513, 39 N. E. 184.

² *Hopt v. Utah*, 110 U. S. 587, 4 Sup. Ct. 202, 28 L. ed. 268; *Roesel v. State*, 62 N. J. L. 216, 41 Atl. 408.

³ *Com. v. Cullen*, 111 Mass. 435.

If an officer should say to the accused, "You had better tell the truth," or, "You had better tell about it," any confession given by the accused thereafter would be incompetent; because such language would naturally convey to the mind of the accused that he would gain some advantage if he confessed his guilt. On the other hand, if the officer merely asked the prisoner to tell the truth, this would not imply that the officer promised any advantage if he confessed, and a confession resultant therefrom would be admissible.¹

And a confession procured by artifice, deception or falsehood, if otherwise competent, is admissible.²

To exclude the confession, the promise of favor must have been made by one in authority,³ and respecting punishment for the crime charged;⁴

¹ *Com. v. Preece*, 140 Mass. 276, 5 N. E. 494; *Flagg v. People*, 40 Mich. 706; *Robinson v. People*, 159 Ill. 119, 34 N. E. 169; *State v. Day*, 55 Vt. 570. *Contra*: *State v. Bradford*, 156 Mo. 91, 56 S. W. 898; *State v. Komstell*, 61 Pac. (Kan.) 805.

² *Burton v. State*, 107 Ala. 108, 18 So. 284; *State v. Phelps*, 74 Mo. 136; *Andrews v. People*, 117 Ill. 201, 7 N. E. 265; *People v. Barker*, 60 Mich. 277, 27 N. W. 539; *Osborn v. Com.*, 14 Ky. L. Rep'r. 246, 20 S. W. 199; *Heldt v. State*, 20 Neb. 492, 30 N. W. 626. ³ *Com. v. Knapp*, 10 Pick. (Mass.) 477.

⁴ *State v. Tatro*, 50 Vt. 483.

and the promise must have been relied on in making the confession.

An arrest in itself is an inducement or pressure upon the accused to speak, and the burden is on the State to show that a confession in answer to questions put by an officer to a prisoner was preceded by a warning that what he said might be used against him.¹

§ 256. **Entire Confession must go In.** — When a confession is introduced as evidence, the entire confession must go in,² and it is always open to explanation by the accused,³ for the doctrine of estoppel does not apply in criminal cases.⁴

§ 257. **Collateral Evidence obtained by Confession is Admissible.** — Although a confession obtained by improper means is not admissible against the accused, yet any collateral evidence obtained by means of the confession may be used against the prisoner.⁵ As where, by promise

¹ *R. v. Kay*, 9 C. C. C. (Can.) 403.

² *People v. Gelabert*, 39 Cal. 663.

³ *State v. Brown*, 1 Mo. App. 86.

⁴ *State v. Hutchinson*, 60 Iowa 478, 15 N. W. 298.

⁵ *Com. v. Knapp*, 9 Pick. (Mass.) 496; *Williams v. Com.*, 27 Gratt. (Va.) 997; *Gates v. People*, 14 Ill. 437; *White v. State*, 3 Heisk. (Tenn.) 338; *Duffy v. People*, 26 N. Y. 588; *People v. Barker*, 60 Mich. 277, 27 N. W. 539.

of favor, a confession was obtained which disclosed the stolen property located in the bed of the prisoner, the confession was inadmissible, but the fact that the property was found in the possession of the prisoner was admissible.¹

§ 258. **Criminal Act and Criminal Intent must be Concurrent.** — To constitute a crime, it is necessary that there exist in the mind of the accused a criminal intent at the very time when he does the criminal act, — that is, the act and the intent must co-exist. An intent without an accompanying act cannot constitute a crime, therefore a magistrate has no authority to cause the arrest of one who is charged with intent of committing an offense.²

§ 259. **Criminal Capacity of Children.** — The law conclusively presumes that a child under the age of seven years cannot entertain a criminal intent, and therefore can never be guilty of a crime.³ A child between the ages of seven and fourteen years is only *prima facie* incapable of

¹ *R. v. Warickshall*, 1 Leach C. C., 4th ed. (Eng.) 263; *State v. Graham*, 74 N. C. 646.

² *Ex parte Muckenfuss*, 52 Tex. Cr. App. 467, 107 S. W. 1131.

³ *People v. Townsend*, 3 Hill (N. Y.) 479; 4 Bl. Com. 23; 1 Hale's P. C. 27.

committing a crime, that is, the presumption that the child has not the criminal capacity may be rebutted by proof that he is capable of forming the necessary criminal intent.¹ In case of a crime charged against one under fourteen years of age, the burden of proof is on the prosecution to show that the party so charged has the capacity of forming a criminal intent, that is, of entertaining a guilty knowledge that he was doing wrong.²

§ 260. **Dying Declarations.** — A statement made by one who believes himself to be in a dying condition, by reason of the solemnity of the occasion and the disposition of the injured party to speak the truth at that time,³ is very weighty evidence concerning the inflicting of the wound which caused the homicide, or the circumstances connected therewith.⁴ Such state-

¹ *Com. v. Mead*, 10 Allen (Mass.) 398; *Angelo v. People*, 96 Ill. 209; *State v. Tice*, 90 Mo. 112, 2 S. W. 269; *State v. Adams*, 76 Mo. 355; *State v. Fowler*, 52 Iowa 103, 2 N. W. 983; *Godfrey v. State*, 31 Ala. 323; *State v. Aaron*, 4 N. J. L. 231.

² *R. v. Smith*, 1 Cox C. C. (Eng.) 260.

³ *R. v. Drummond*, 1 Leach C. C., 4th ed. (Eng.) 337; *People v. Olmstead*, 30 Mich. 431.

⁴ *Scott v. People*, 63 Ill. 508; *Wroe v. State*, 20 Ohio St. 460; *State v. Garrand*, 5 Oreg. 216; *State v. Shelton*, 47 N. C. 364; *Savage v. State*, 18 Fla. 909;

ments are called "dying declarations," and may be either oral or written, or even by signs.¹

§ 261. **Condition of the Declarant.** — The party making such declaration must be in apprehension of immediate death, and without hope of recovery,² and death must eventually occur, although the fact that the death does not occur as soon as expected, will not render the declaration inadmissible.³

State v. Reed, 137 Mo. 125, 38 S. W. 574; *State v. Pearce*, 56 Minn. 226, 57 N. W. 652; *Starr v. Com.*, 97 Ky. 193, 30 S. W. 397; *People v. Davis*, 56 N. Y. 103; *Sullivan v. State*, 102 Ala. 135, 15 So. 264; *Bryant v. State*, 80 Ga. 272, 4 S. E. 853; *Ex parte Fatheree*, 34 Tex. Cr. 594, 31 S. W. 403; *Puryear v. Com.*, 83 Va. 51, 1 S. E. 512.

¹ *Com. v. Casey*, 11 Cush. (Mass.) 417; *Mockabee v. Com.*, 78 Ky. 382; *Daughdrill v. State*, 113 Ala. 7, 21 So. 378; *State v. Somnier*, 33 La. 239.

² *Com. v. Roberts*, 108 Mass. 296; *Com. v. Bishop*, 165 Mass. 148, 42 N. E. 560; *Simons v. People*, 150 Ill. 73, 36 N. E. 1019; *State v. Wilson*, 121 Mo. 434, 26 S. W. 357; *Archibald v. State*, 122 Ind. 122, 23 N. E. 758; *Vaughan v. Com.*, 86 Ky. 431, 6 S. W. 153; *State v. Baldwin*, 79 Iowa 714, 45 N. W. 297; *State v. Daniel*, 31 La. 91; *Com. v. Mika*, 171 Pa. St. 273, 33 Atl. 65; *Cole v. State*, 105 Ala. 76, 16 So. 762; *Whittaker v. State*, 79 Ga. 87, 3 S. E. 403.

³ *Com. v. Haney*, 127 Mass. 455; *State v. Reed*, 53 Kan. 767, 37 Pac. 174; *People v. Weaver*, 108 Mich. 649, 66 N. W. 567; *State v. Craine*, 120 N. C. 601, 27 S. E. 72; *People v. Chase*, 79 Hun (N. Y.) 296, 29 N. Y. S. 894; *Moore v. State*, 96 Tenn. 209, 33

§ 262. **Competency of the Declarant.** — The declaration must have been made by one who, if living, would be a competent witness in court.¹ So the dying declaration of a child four years of age was held to be incompetent.²

§ 263. **Best Evidence Only is Competent.** — Whenever evidence to establish a crime is given, it must be the best evidence obtainable, and any evidence which presupposes better evidence will be rejected. Therefore one may not ordinarily testify to what another person has said, because the party originally making the statement was not under oath or subject to a cross-examination.

And then, too, it would be better evidence if from the lips of the person who made the original statement, for the party who heard the statement might not have correctly understood it. But the sole reason for the rejection of such testimony is that the party was not under oath or open to cross-examination.

S. W. 1046; *White v. State*, 111 Ala. 92, 21 So. 330; *Evans v. State*, 58 Ark. 47, 22 S. W. 1026; *Radford v. State*, 33 Tex. Cr. 520, 27 S. W. 143.

¹ *R. v. Pike*, 3 C. & P. (Eng. N. P.) 598; *State v. Ah Lee*, 8 Oreg. 214; *R. v. Drummond*, 1 Leach C. C., 4th ed. (Eng.) 337; *State v. Elliott*, 45 Iowa 486; *People v. Sanford*, 43 Cal. 29.

² *R. v. Pike*, *supra cit.*

§ 264. **Doubt Always goes to Benefit of Accused.** — In all cases of doubt arising in the criminal law the benefit of the doubt should be given to the accused,¹ and that too whether the doubt arises upon a construction of the law applicable to the case, or upon the evidence of the guilt of the prisoner.

§ 265. **Ignorance of Law.** — It is a maxim of the law that "Ignorance of the law excuses no one."² There seems, however, to be one exception to that rule, in that where a person takes property under such circumstances that it amounts to larceny, he is not guilty of larceny if he took it under a *bona fide* belief that it was his own, even though the mistake was one of the law governing ownership.³

So where A. had set snares on the land of B., and a servant of B., finding the snares with an entrapped pheasant in one of them, appropriated them under authority of a statute, to the use of

¹ O'Neil v. State, 48 Ga. 66.

² Thompson v. State, 26 Tex. App. 94, 9 S. W. 486; U. S. v. Anthony, 11 Blatchf. (U. S. C. C.) 200.

³ Com. v. Stebbins, 8 Gray (Mass.) 495; Com. v. Doane, 1 Cush. (Mass.) 5; State v. Holmes, 17 Mo. 379; Dye v. Com., 7 Gratt. (Va.) 662; People v. Husband, 36 Mich. 306; R. v. Hall, 3 C. & P. (Eng. N. P.) 409.

his master. A., finding the servant had appropriated the snares and pheasant, forcibly compelled the servant to give them up, under the belief that they remained his property. *Held*, no robbery, because his *bona fide* impression that he was only getting his own property showed that the *animus furandi*, — the intent to steal, necessary to a robbery, was not present.¹

And where the defendant lent the father of the plaintiff two hundred dollars, and took his note therefor, payable on demand, with interest, and the father died, leaving the note unpaid, the son appropriated all the property of his deceased father to his own use, taking out no letters of administration. Subsequently while the son was counting money in the presence of the defendant, the defendant seized the money, saying, "that she had a right to it; that she had been looking for it for a long time, and now she had got it; that the old man owed her, and now it was time for her to get her own." *Held*, that the instruction to the jury, that the defendant was not guilty of larceny if she took the money under an honest belief that she had a legal right to take it, was clearly correct.²

¹ *R. v. Hall*, 3 C. & P. (Eng. N. P.) 409.

² *Com. v. Stebbins*, 8 Gray (Mass.) 495.

CHAPTER XII

EXEMPTION FROM ARREST

§ 266. **Sovereigns and Diplomatic Agents.**—The law of nations protects the sovereign of a friendly foreign country and his retinue of servants from arrest while passing through or sojourning temporarily in our country.¹ The law also protects his ambassador or other diplomatic agent sent by him to this country,² and this protection is not extended to the person alone of such functionary, but to his secretary, attendants, and retinue, his couriers and domestic servants

¹ Wheaton's Int. Law, 6th ed. 143, 146.

² Dupont v. Pichon, 4 Dall. (U. S.) 321, 1 L. ed. 851; Woolsey Int. Law, 135. The remedy against a diplomatic agent who transgresses the criminal laws so as to affect individuals only, is to demand his recall, and if the demand be refused, to expel him from the country. If, however, the crime affect the safety of the government, the government may, if necessary to its safety, seize and hold him until the danger be passed, or forcibly expel him from the country. 7 Op. Atty. Gen. (U. S.) 367.

as well.¹ Neither he nor his are subject to the civil or criminal processes of our courts.

A foreign minister cannot waive his privilege because it is that of his sovereign; and an attache of a foreign legation is a "minister."² The fact

¹ *U. S. v. Lafontaine*, 4 Cranch (U. S. C. C.) 173; *Lockwood v. Coysgarne*, 3 Burr. (Eng. K. B.) 1676; *Inglis v. Sailors Snug Harbor*, 3 Pet. (U. S.) 99, 7 L. ed. 617; *Respublica v. De Longchamps*, 1 Dall. (Pa.) 111. Although the secretary of a minister is included, the wife of the secretary is not exempt. *English v. Caballero*, 3 D. & R. (Eng. K. B.) 25.

² *U. S. v. Benner, Baldwin* (U. S. C. C.) 234. The exemption of attaches of foreign legations is well shown in the following correspondence between the State Department of the United States and the Governor of Massachusetts concerning a case wherein the automobile law of Massachusetts was violated.

Following is the telegram from the State Department:

"Washington, D. C., Sept. 26, 1904.

"To the Hon. John L. Bates, Governor of Massachusetts:

"British embassy informs me that Mr. Gurney, third secretary of that embassy, charged with driving his automobile at excessive speed, was to-day arrested by deputy sheriff and taken, after entering protest, under threat of force, to the court at Lee, when in spite of his protest he was sentenced by H. S. C. Phelps, special justice of Lee Police Court, to pay a fine of \$25, and on his declaring he could not admit the right of the court to sentence him, another fine of \$25 for contempt of court and to go to prison if he did not pay.

that the officer did not know him to be such is no excuse for the arrest.¹

"Section 4064, Revised Statutes of the United States, declares that any writ or process issued out or prosecuted by any person in any State court, or any judge or justice, whereby the person of any public minister of a foreign state is arrested or imprisoned, shall be deemed void.

"Section 4064 declares that any person obtaining or prosecuting such writ or process, and every officer concerned in executing it, shall be deemed a violation of the law of nations, and subject to imprisonment and fine.

"I have to request that you take such action as may be proper in this case.

"ALVEY A. ADEE,

"Acting Secretary of State."

After a consultation with Assistant Attorney-General Nash, Governor Guild sent the following telegram:

"To the Hon. H. S. C. Phelps, Special Justice, Lee, Mass.:

"The following telegram has been received this morning from the State Department at Washington: (Here follows a copy of the telegram of Secretary Adee, printed above.)

"The assistant attorney-general informs me that if the facts are as stated above, you have, in your endeavor to enforce the laws of Massachusetts for the security of life upon our highways, committed in this particular case a grave breach of international law.

¹ U. S. v. Benner, Baldwin (U. S. C. C.) 234. But see Chase v. Fish, 16 Me. 132.

But this immunity from arrest does not prevent a citizen of our country from exercising the usual rights of self-defense when attacked by such exempted person.¹

§ 267. **Commercial Agents. — Consuls. —** Consuls-general are exempt,² but consuls are not,³

May I ask you to telegraph me at once if Mr. Gurney was arrested and fined in spite of protest. Other channels of redress are open in case of the violation of Massachusetts laws by the diplomatic representatives of other nations.

"Therefore, if fine was imposed and collected, the Commonwealth will apologize, the fine must be remitted, and I need not suggest to one so respected as you, the personal amend that you will, of course, desire to make to Mr. Gurney for the error in method adopted by your court in this unusual case.

"Kindly forward me affidavit of the evidence of any breach of our Massachusetts laws.

"CURTIS GUILD, JR.,
"Acting Governor."

The telegram to Secretary Adees was as follows:

"Your telegram in regard to third secretary British embassy just received. Investigation already started. Immediate action will be taken.

"CURTIS GUILD, JR.,
"Acting Governor."

As to the remedy in such cases, see § 266, *supra*, note 2.

¹ U. S. v. Ortiga, 4 Wash. (U. S. C. C.) 531.

² Marshall v. Critico, 9 East (Eng. K. B.) 447.
Contra: Com. v. Kosloff, 5 S. & R. (Pa.) 545.

³ Com. v. Kosloff, *supra cit.*

they being mere commercial agents, owing a temporary allegiance to the state, and not diplomatic agents, who owe no allegiance to the state.

§ 268. **Attorneys-at-Law. — Judges.** — Among others who are exempt from civil arrest only, are attorneys-at-law while attending court.¹ But the privilege of attorneys is not so much for their benefit as it is for the benefit of their clients,² and is therefore confined to attorneys who practice.³ Judges are exempt on process issued from their own courts.⁴

§ 269. **Other Exemptions.** — So also are bail exempt while attending court as such;⁵ a petitioning bankrupt attending before commissioners to be examined;⁶ insolvent debtors lawfully

¹ *Secor v. Bell*, 18 Johns. (N. Y.) 52. In Georgia it is held that this rule of the common law never obtained in America, owing to the essential difference in the relations which the profession sustains both to the courts and the public in England and this country. *Elam v. Lewis*, 19 Ga. 608.

² *Gardner v. Jessop*, 2 Wils. (Eng. C. P.) 44; *Mayor of Norwich v. Berry*, 4 Burr. (Eng. K. B.) 2113; *Wiltshire v. Lloyd*, 3 Doug. (Eng. K. B.) 381.

³ *Goldsmith v. Baynard*, 2 Wils. (Eng. C. P.) 232; *Mayor of Norwich v. Berry*, *supra cit.*

⁴ *Tracy v. Whipple*, 8 Johns. (N. Y.) 381.

⁵ *Rimmer v. Green*, 1 Maule & S. (Eng. K. B.) 638.

⁶ *In re Kimball*, 2 Ben. (U. S. D. C.) 38.

discharged,¹ — but not when sued on subsequent liabilities or promises; ² clergymen while performing divine service, or going to or returning from the performance of such service on any day of the week; ³ militia men on military duty,⁴ except commissioned officers under certain circumstances; ⁵ electors while attending, or going to or returning from a public election; ⁶ jurors attending court; ⁷ suitors and witnesses if summoned; ⁸ but inhabitants of another State attending as witnesses are privileged from arrest whether summoned or not; ⁹ sheriffs and other peace

¹ *Wilmarth v. Burt*, 7 Mete. (Mass.) 257; Rev. Laws of Mass. c. 163, § 95.

² *Horton v. Moggridge*, 6 Taunt. (Eng. C. P.) 563; *Glazier v. Stafford*, 4 Harr. (Del.) 240.

³ Bacon's Abr. (Trespass).

⁴ *People v. Campbell*, 40 N. Y. 133; *In re Turner*, 119 Fed. (U. S.) 231; Rev. Laws of Mass. c. 16, § 174.

⁵ *Ex parte Harlan*, 39 Ala. 563.

⁶ *Swift v. Chamberlain*, 3 Conn. 537; *Thomas v. Henderson*, 125 La. 292, 51 So. 202.

⁷ *Ex parte McNeil*, 3 Mass. 288. But the privilege of a juror is personal and may be waived; *Brown v. Tatro*, 115 Mich. 368, 73 N. W. 421.

⁸ *Ex parte McNeil*, 6 Mass. 264. If the arrest is submitted to, the imprisonment cannot afterward be objected to as unlawful; *Brown v. Getchell*, 11 Mass. 11.

⁹ *May v. Shumway*, 82 Mass. 86; *In re Thompson*, 122 Mass. 428.

officers while actually engaged in the performance of their duties,¹ but not at other times,² except by statute.³ And a sheriff is not privileged from arrest for debt,⁴ except by statute.

§ 270. **Government Employees.** — An employee of the United States government is not exempt from arrest on process issued by a State court on a charge of felony.⁵ And the driver of a wagon in which the mail is being carried is not exempt from arrest for driving through a crowded street at a dangerous rate of speed, by the Act of Congress prohibiting the stoppage of the mails.⁶

§ 271. **Legislators.** — Members of Congress, and State legislators, while attending their respective assemblies, or going to or returning from the same, are protected from arrest on all charges except treason, felony or "breach of the peace," which latter term includes all indictable offenses.⁷

¹ *Welby v. Beard*, Taylor (Up. Can.) 415.

² *Coxson v. Doland*, 2 Daly (N. Y.) 66.

³ "A sheriff shall not be arrested upon mesne process, or execution in a civil action." Rev. Laws of Mass. c. 23, § 10. See also § 280, *infra*.

⁴ *Day v. Brett*, 6 Johns. (N. Y.) 22.

⁵ *U. S. v. Kirby*, 74 U. S. 482, 19 L. ed. 278.

⁶ *U. S. v. Hart*, Pet. (U. S. C. C.) 390.

⁷ *Rawlins v. Ellis*, 16 M. & W. (Eng. Exch.) 172; *Williamson v. U. S.*, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. ed. 278.

This protection to members of Congress, is given by the Constitution of the United States,¹ and that of the members of the State legislatures is generally secured to them by the constitutions of the various States,² or by the common law. A member of a house of representatives who has been expelled by that body is no longer entitled to the protection;³ nor is one entitled to protection who has merely been elected, but who has not yet taken his seat.⁴

§ 272. **Exemption may not always be Waived.**
— Exemption from arrest is usually a personal privilege⁵ which may be waived by the privileged person.⁶ The privilege of a legislator, however, is not his personal privilege, but is that of the people whose representative he is, therefore the privilege cannot be waived by him.⁷

¹ Const. U. S. Art. 1, § 6.

² *Hiss v. Bartlett*, 3 Gray (Mass.) 468. "No member of the house of representatives shall be arrested or held to bail on mesne process, during his going unto, returning from, or his attending the general assembly." Const. Mass. c. 1, § 3, Art. 10.

³ *Hiss v. Bartlett*, *supra cit.*

⁴ *Chase v. Fish*, 16 Me. 132.

⁵ *Smith v. Jones*, 76 Me. 138.

⁶ *Brown v. Getchell*, 11 Mass. 11.

⁷ *Anderson v. Roundtree*, 1 Pinn. (Wis.) 115. But see *Chase v. Fish*, *supra cit.*

By the same line of reasoning, an attorney could not waive his privilege, for the privilege is really that of his client, whose interests would be imperiled.

§ 273. **Writ of Protection.** — A writ of protection is only *prima facie* proof of exemption from arrest, and is of itself no further useful than as it serves to give notice to the officer about to make the arrest.¹

§ 274. **Parties attending Court.** — This writ is not necessary to one whose duty brings him to court, in order that he may be shielded from arrest in a civil case. If a juror or any other person whose duty brings him to court, whether as a party or as a witness, is arrested while attending the court, or in going to or returning from the court, the court will, upon motion, take order for his discharge.² Such arrest is a contempt of court,³ and may subject the party making the

¹ *Ex parte* Daniel McNeil, 6 Mass. 264.

² The case of Archibald McNeil, 3 Mass. 287; *Ex parte* Archibald McNeil, 6 Mass. 245; *Wood v. Neale*, 5 Gray (Mass.) 538; *Thompson's Case*, 122 Mass. 428.

³ *Blight v. Fisher*, Pet. (U. S. C. C.) 41; *Wood v. Neale*, 5 Gray (Mass.) 538; *State v. Buck*, 62 N. H. 670.

arrest to a prosecution for the offense. But this protection does not extend to one who comes to court, in his own State, as a volunteer, without summons.¹ A voluntary witness, however, from another State is protected,² but it has been held that a non-resident voluntarily attending court to answer to a misdemeanor is not privileged from arrest under civil process.³ And a non-resident defendant in a criminal case is not entitled to an opportunity to return home before being arrested in a civil proceeding.⁴ It should be noted, however, that no witness in attendance at court is privileged from arrest when charged with an indictable offense.⁵

§ 275. **Waiver of Privilege by Parties attending Court.** — The immunity from arrest, enjoyed by one who is attending court as a party to a proceeding then pending, being a personal privilege, may be waived, as by submission to arrest; and the arrested party cannot afterward object to the imprisonment as for that reason unlawful.⁶ But a

¹ *Ex parte* Daniel McNeil, 6 Mass. 264.

² *May v. Shumway*, 16 Gray (Mass.) 86.

³ *Rogers v. Rogers*, 138 Ga. 803, 76 S. E. 48.

⁴ *Ex parte* Henderson, — N. D. —, 145 N. W. 574.

⁵ *Ex parte* Levi, 28 Fed. (U. S.) 651.

⁶ *Brown v. Getchell*, 11 Mass. 11.

witness from another State, arrested before he has completely given his testimony, does not waive his privilege of exemption from arrest by giving bail.¹

§ 276. **Persons under Guardianship.** — A spendthrift, under guardianship, is exempt from arrest on execution issued for debt or damages in a civil action, whenever the statute requires an affidavit to be made that the party sought to be arrested has been guilty of one of the fraudulent or wasteful acts specified in the statute,² because the property of the debtor is not under his own control, but under that of his guardian, consequently he could not be guilty of fraud in not applying it to the debt, and he may be discharged on *habeas corpus*.

Where no affidavit is required by the statute to warrant an arrest on an execution, it has been held that a lunatic under guardianship might be so arrested.³

§ 277. **Officer not liable for arresting Exempted Party.** — An officer who acts according to his precept in making an arrest, is not a trespasser, although the party arrested is privileged from arrest.⁴ An exemption from arrest is a personal

¹ *Dickinson v. Farwell*, 71 N. H. 213, 51 Atl. 624.

² *Blake's Case*, 106 Mass. 501.

³ *Ex parte Leighton*, 14 Mass. 207.

⁴ *Chase v. Fish*, 16 Me. 132.

privilege which may be waived; and therefore an officer making an arrest is not guilty of a trespass until he knows that the privilege of exemption is claimed.¹ And failure of a non-resident to deny legality of arrest, and execution issued in a civil case, is a waiver of the privilege to be free from arrest while within a State to testify as a witness.² This waiver is a personal privilege not to be pleaded by the wife in defense to a contract by her to pay the judgment.³ But the privilege of a legislator, or attorney is said not to be personal, but to belong to those whom they represent.⁴

§ 278. **Exemption may include Going to and Coming from a Certain Place.** — The exemption from arrest in consideration of a certain character and specified place, includes the stay, and a reasonable time for going and returning,⁵ but does not include delays or deviations.⁶ So where a party exempted from arrest by reason of attendance at court, went out of a direct route on his return home, for the purpose of attending the

¹ Reed v. State, 103 Ark. 391, 147 S. W. 76.

² Savage v. Sully, 74 N. Y. Misc. 98, 131 N. Y. S. 619.

³ Savage v. Sully, *supra cit.* ⁴ See § 262, *supra*.

⁵ Smythe v. Banks, 4 Dall. (U. S.) 329, 1 L. ed. 854.

⁶ Chaffee v. Jones, 19 Pick. (Mass.) 260.

funeral of his son, it was held that his privilege was forfeited by the deviation.¹ But where a voter at a public election had given in his vote, and retired to a house in the neighborhood to await the result of the official count of the votes, it was held that he was attending to the business of the election, and therefore exempt from arrest on civil process.² If an elector has not actually proceeded on his way to the voting-place, but is merely preparing to go, he cannot claim the privilege.³

A person who was alleged to have been elected to Congress, having been denied a seat by that body, is privileged from arrest until he reaches his home, and any delay by reason of sickness or want of funds does not remove the privilege.⁴

§ 279. **Debtors from Another State.** — Under a statute authorizing the arrest of a debtor on the ground that he is about to leave the State to avoid the payment of his debts, some courts hold that it is only a citizen of the State in which the arrest is made, and in which the debt exists, that is subject to arrest,⁵ and that a citizen of another State is

¹ *Ibid.* ² *Swift v. Chamberlain*, 3 Conn. 537.

³ *Hobbs v. Getchell*, 8 Me. 187.

⁴ *Dunton v. Halstead*, 2 Pa. L. J. Rep. 450.

⁵ *Stevenson v. Smith*, 28 N. H. 12; *McKay v. Ray*, 63 N. C. 46.

exempt from such arrest; while other courts hold that the statute extends to a debtor who is a citizen of another State, but who is temporarily within the State where he owes the debt, returning or intending to return home, as well.¹

§ 280. **Statutory Exemptions.** — Exemptions from arrest, other than those hereinbefore specified, such as women, mariners, and others in certain cases, are sometimes made by statute.²

When a statute names a sheriff only, as exempt from arrest under civil process, the protection does not extend to a deputy sheriff.³

¹ *Tallemon v. Cardenas*, 14 La. Ann. 509; *Rutland Bank v. Barker*, 27 Vt. 293. See also § 274, *supra*.

² "No woman shall be arrested on mesne process, except for tort. No person shall be arrested on mesne process in a civil action for slander or libel." Rev. Laws of Mass. c. 168, § 3. See *Foss v. Hildreth*, 10 Allen (Mass.) 76, holding that a threat to make an arrest for slander is, under the statute, a threat to make an unlawful arrest. "A seaman who has shipped or entered into a contract for a voyage from a port in this Commonwealth shall not be liable to arrest on mesne process on account of a debt to a landlord or boarding house keeper." Rev. Laws of Mass. c. 66, § 4. A sheriff is exempt, by Rev. Laws of Mass. c. 23, § 10, from arrest at any time on mesne process or execution in a civil action.

³ *George v. Fellows*, 58 N. H. 494.

CHAPTER XIII

FALSE IMPRISONMENT

§ 281. **Definition.** — Any unlawful restraint of a person contrary to his will,¹ either with or without process of law, is a false imprisonment,² and makes the restraining offender liable to the State in a criminal action, and to the imprisoned one in a civil action.

§ 282. **Restraint must be against the Will.** — The restraint must be without the consent of the imprisoned party, and a child of tender years may not be able to give such consent as will make the imprisonment lawful.³

§ 283. **Restraint must be Total.** — The restraint must be a total one. Compelling a man to go in a given direction against his will may amount to an imprisonment, and if it is an *entire*

¹ *Com. v. Nickerson*, 5 Allen (Mass.) 518.

² *Comer v. Knowles*, 17 Kan. 436; *Brewster v. People*, 183 Ill. 146, 55 N. E. 640.

³ *Com. v. Nickerson*, *supra cit.*

restraint, there certainly is an imprisonment. So if an officer commands a person to go with him, and the orders are obeyed, and they go in the direction pointed out by the officer, that is an imprisonment, though no actual violence be used, and though there is not even a touching of the person ; it is enough that there is a complete control of the person's liberty, and a submission by him.

But restraining a man from going in a particular direction, at the same time leaving one direction open and free for him to go if he choose, does not constitute an imprisonment, because there is no *total* restraint of his freedom.¹

§ 284. **Restraint may be by Words.** — In ordinary practice, words are sufficient to constitute an imprisonment, if they impose a restraint upon the person, and the party is accordingly restrained ; for he is not obliged to incur the risk of personal violence and insult by resisting until actual violence be used. This principle is reasonable in itself, and is fully sustained by the authorities.

§ 285. **Having in Power is Sufficient.** — Nor does there seem that there should be any very

¹ *Bird v. Jones*, 7 Q. B. (Eng.) 742.

formal declaration of arrest. If the officer goes for the purpose of executing his warrant, and has the party in his presence and power, if the party so understands it and in consequence thereof submits, and the officer, in the execution of the warrant, takes the party before a magistrate, or receives money or property in discharge of his person, it is in law an arrest, although he did not touch any part of the body.¹

§ 286. **Touching not Necessary to complete Offense.** — It is not necessary to constitute false imprisonment that the person restrained of his liberty should be touched or actually arrested. If he is ordered to do or not to do the thing, to move or not to move against his own free will, — if he is not left to his option to go or stay where he pleases, and force is offered, or there is reasonable ground to apprehend that coercive measures will be used if he does not yield,² the offense is complete upon his submission.

A false imprisonment may be committed by words alone, or by acts alone, or by both, and by merely operating on the will of the individual, or by personal violence, or both. It is not neces-

¹ Pike v. Hanson, 9 N. H. 491.

² Johnson v. Tompkins, 1 Baldwin (U. S. C. C.) 571.

sary that the individual be confined within a prison or within walls, or that he be assaulted or even touched.¹

It may be committed by threats,² but it is not necessary that it be a malicious act, or that the slightest wrongful intention exist.³

§ 287. **Must be a Threat or Show of Force.** — Proof that the defendant induced the plaintiff to go to another place, and there remain in concealment for a time, by threats of a criminal prosecution and misrepresentations, but without using or threatening to use force, is not sufficient to maintain the action.⁴

§ 288. **Warrant valid in Form, from Court of General Jurisdiction, protects Officer.** — As a general rule, to secure immunity from liability, the officer is bound only to see that the process which he is called upon to execute is in due and regular form, and issues from a court having general jurisdiction of the subject. In such case he is justified in obeying his precept. And it is

¹ *Comer v. Knowles*, 17 Kan. 435.

² *Herring v. State*, 3 Tex. App. 108; *Meyer v. State*, 49 S. W. (Tex.) 600.

³ *Comer v. Knowles*, *supra cit.*

⁴ *Payson v. Macomber*, 3 Allen (Mass.) 69.

highly necessary to the due, prompt, and energetic execution of the commands of the law that he should be so.¹

Therefore an officer who has an execution from a court of competent jurisdiction is not liable for arresting a defendant who shows his discharge in insolvency to the officer before he is arrested.²

An officer cannot stop to try the validity of such a certificate of discharge when he is about to serve a legal process, and to so hold would defeat the service.

§ 289. **Serving Lawful Process Improperly.**—**Joint Liability.**—Serving lawful process in an unauthorized manner constitutes false imprisonment.³

A person who causes another to be arrested on mesne process in a civil action is liable to an action of false imprisonment, if he fails to first make an affidavit that is required by statute.⁴

If an arrest under a lawful warrant be made for the purpose of extorting money, or unlawfully to enforce the payment of a civil claim, an action of false imprisonment will lie against all who have,

¹ *McMahan v. Green*, 34 Vt. 69.

² *Wilmarth v. Burt*, 7 Mete. (Mass.) 257.

³ *Wood v. Graves*, 144 Mass. 365, 11 N. E. 567.

⁴ *Cody v. Adams*, 7 Gray (Mass.) 59.

either directly or indirectly, participated therein.¹ But procuring a warrant by misrepresentations does not make the party so procuring the warrant liable to an action for false imprisonment.² Nor does legally enforcing the payment of a debt by means of an arrest, constitute the offense.³

Where the owner of a float, which was held for salvage, and which the owner did not attempt to recover until after a lapse of twelve weeks, appeared with an officer, and his demand for the float being refused without payment of the charges, the officer without a warrant arrested the accused, it was held that the arrest was the joint act of the owner and the officer and that the owner was liable in damages for the false imprisonment.⁴

On an execution against a corporation, styled the president, directors, and company of a turnpike, the officer was held liable for the arrest and detention of one of the proprietors, because the party arrested was neither named nor described in the writ, the corporate name not being the

¹ *Hackett v. King*, 6 Allen (Mass.) 58; *Vanderpool v. State*, 34 Ark. 174; *Slomer v. People*, 25 Ill. 61; *Neufeld v. Rodeminski*, 144 Ill. 88, 32 N. E. 913.

² *Coupal v. Ward*, 106 Mass. 289.

³ *Mullen v. Brown*, 138 Mass. 114.

⁴ *Robitaille v. Mason and Young*, 9 B. C. R. (Can.) 499.

name or description of any natural person whomsoever, therefore he did that which his precept did not authorize him to do, when he made the arrest.¹

§ 290. **Discharging Prisoner without taking before Magistrate.** — To arrest a man for being drunk and disorderly, and then discharge him without taking him before a magistrate, constitutes the offense, unless the prisoner waived his right to be so taken, by consenting to the discharge.²

§ 291. **Subsequent Arrest for Offense committed in Presence of Officer.** — Where an officer arrests an intoxicated person, while guilty of disorderly conduct, and releases him on his promise to go directly home, he may lawfully retake him, on his going into a bar-room before he is out of the officer's sight, and is not guilty of false imprisonment in so doing; and it makes no difference whether the final restraint be considered a recaption, or a new arrest for disorderly conduct still continuing.³

¹ *Nichols v. Thomas*, 4 Mass. 232.

² *Broek v. Stimson*, 108 Mass. 520; *Keefe v. Hart*, 213 Mass. 476, 100 N. E. 558.

³ *Com. v. Hastings*, 9 Mete. (Mass.) 262.

§ 292. **Imprisoned Party must be Conscious of Restraint.** — To constitute an imprisonment, the party imprisoned must be conscious of the restraint.¹ So where a schoolmaster, improperly, and under a claim for money due for schooling, refused to allow the mother of an infant scholar to take her son home with her, and the son, though frequently demanded by the mother, was kept at the school, there being no proof that the boy knew of the demand and denial, or that any restraint had been imposed upon him, it was held, when he brought an action for false imprisonment, that it was not maintainable.²

¹ *Herring v. Boyle*, 1 Crompt. M. & R. (Eng. Exch.) 377.

² *Ibid.*

CHAPTER XIV

TRESPASS

§ 293. **Definition.** — A trespass is any misfeasance,—that is, the doing of a lawful act in an unlawful manner,—or act of one man whereby another is injuriously treated or damaged,¹ either in his person, his property, or his rights. And a trespasser has been defined to be one who does an unlawful act, or a lawful act in an unlawful manner, to the injury of the person or property of another.²

§ 294. **Trespass Vi et Armis.** — A trespass committed with force, as, for example, striking another unlawfully, is said to be done *vi et armis* (with force and arms).

§ 295. **Accidental Acts.** — As the ground of compensation is the injury done, a civil action lies for an unintentional act of trespass, even if there is no malice;³ but not always for an acci-

¹ 3 Bl. Com. 208.

² Bouvier's Law Diet. (Trespasser).

³ Bigelow v. Stearns, 19 Johns. (N. Y.) 38.

dental act.¹ Such accidental act, however, will not excuse a trespass, unless the act be unintentional, unavoidable, and without the least fault on the part of the trespasser.²

§ 296. **Criminal Intent Necessary to Criminal Action.** — But a *criminal* action for trespass does not lie unless the trespass be done with a criminal intent,³ — that is, an intent to commit a crime. A criminal intent does not necessarily mean that a knowledge of wrong-doing must exist, for it has been held that a mere knowledge of the facts of the case will supply this intent;⁴ and it is immaterial whether the person who committed the offense knew that it was in violation of the law. But a mere intent to commit a crime without an actual attempt, does not justify an arrest.⁵

§ 297. **Officer not Chargeable with Errors of Magistrate.** — An officer is never liable for the regular enforcement of legal process which con-

¹ *Brown v. Kendall*, 6 Cush. (Mass.) 292; *Vincent v. Stinehour*, 7 Vt. 62; *Hobart v. Hagget*, 12 Me. 67; *Blewitt v. Phillips*, 1 Q. B. (Eng.) 86.

² *Jennings v. Fundeburg*, 4 McCord (S. C.) 161.

³ *Bessey v. Olliott*, T. Raym. (Eng. K. B.) 467.

⁴ *U. S. v. Anthony*, 11 Blatchf. (U. S. C. C.) 200.

⁵ *Ex parte Muckenfuss*, 52 Tex. Cr. App. 467, 107 S. W. 1131.

tains errors made by the issuing magistrate, provided the process is regular on its face.¹

§ 298. **Unauthorized Entrance of Officer is at his Peril.** — An officer armed with civil process, who enters upon premises without invitation of the occupant thereof, who has done no act to induce the officer to reasonably believe that the party whom he seeks to serve is there, is a trespasser, if the person whom he seeks is not a resident there, or there in fact.²

§ 299. **Statutory Authority must be followed Strictly.** — An officer who makes an arrest by authority of a statute, must follow the statute strictly, or he becomes a trespasser. As where an officer arrests an intoxicated person under authority of a statute which provides that the officer shall take the arrested person "before some justice of the peace, or police court in the city or town wherein he has been found, and shall make complaint against him for the crime of drunkenness," is guilty of trespass if he takes him before a justice in another town,³ if there is a justice in the town where he is found, or if he releases him

¹ *Stutsman County v. Wallace*, 142 U. S. 293, 12 Sup. Ct. 227, 35 L. ed. 1019.

² *Blatt v. McBarron*, 161 Mass. 21, 36 N. E. 468.

³ *Papineau v. Bacon*, 110 Mass. 319.

without taking him before a justice at all.¹ And an officer is never liable for an act done under the authority of a constitutional statute;² otherwise if the statute is unconstitutional.

§ 300. **Arrest for Intoxication.** — If an officer, without a warrant, arrests a person for being intoxicated, he does so at his peril; that is, if the person so arrested is not in fact intoxicated, the officer is guilty of trespass, for nothing but clear proof of the intoxication will justify the arrest. The fact that the arrest was made in good faith, and under a reasonable belief of the intoxication, will not excuse the trespass.³ And it is immaterial how the intoxication was produced.⁴ But an officer is not liable *criminally* for arresting a person who is subsequently shown not to have been intoxicated at the time of the arrest.⁵

The New York Code of Criminal Procedure, § 177, making intoxication in a *public* place a misdemeanor, does not allow arrest for intoxica-

¹ *Brook v. Stimson*, 108 Mass. 520; *State v. Parker*, 75 N. C. 249.

² *Brown v. Beatty*, 34 Miss. 227.

³ *Phillips v. Fadden*, 125 Mass. 198.

⁴ *Com. v. Coughlin*, 123 Mass. 436.

⁵ *Com. v. Cheney*, 141 Mass. 102, 6 N. E. 724. But see *State v. Hunter*, 106 N. C. 796, 11 S. E. 187.

tion, without a warrant, where, when arrested, the defendant was lying down on a couch in a private house.¹

§ 301. **Liability of Party assisting an Officer.** — There seems to be some doubt whether a private person who, at the command of an officer, assists him in making an arrest, is guilty of trespass, if the process in the hands of the officer is not regular and valid. The cases which hold that the private person called upon under such circumstances is not liable, seem to be founded upon the better reasoning. It is certainly neither law nor accurate reasoning to assume that a person upon whom the performance of a duty is thrown by law, as it is when a known officer commands assistance in making an arrest, and who is subject to a criminal prosecution if he does not obey the command of the law,² is not fully protected by the law in the performance of that duty.

A fair statement of the law applicable in such

¹ *People v. Brown*, 64 N. Y. Misc. 677, 120 N. Y. S. 859. See also § 147, *supra*.

² *Coyles v. Hurin*, 10 Johns. (N. Y.) 84; *Watson v. State*, 83 Ala. 60; *Dougherty v. State*, 106 Ala. 63, 17 So. 393; *McMahan v. Green*, 34 Vt. 69; *Pruitt v. Miller*, 3 Ind. 16; *Firestone v. Rice*, 71 Mich. 377, 38 N. W. 885.

cases would seem to be, that one who, at the *command* of an officer, assists him in the execution of legal process, is fully protected, although the process is not regular and valid; but if he acts of his own volition, he must show that the process is valid, in order to justify his act.¹

But where the original act of the officer is wrongful in itself, as it would be if the officer, without a warrant, were to arrest one for a past misdemeanor, any stranger who aids him in it will be liable to the party injured, although he acts by the officer's command.

§ 302. **Bystander may be justified in not Responding.** — A bystander is not obliged to respond to an officer's command of assistance unless there is a reasonable necessity. He may also set up physical impossibility or other lawful excuse in defense.²

¹ *Reed v. Rice*, 2 J. J. Marshall (Ky.) 44; *State v. Staleup*, 1 Ired. (N. C.) 30; *McMahan v. Green*, 34 Vt. 69; *Firestone v. Rice*, 71 Mich. 377, 38 N. W. 885; *Watson v. State*, 83 Ala. 60, 3 So. 441. *Contra*: *Elder v. Morrison*, 10 Wend. (N. Y.) 128; *Hooker v. Smith*, 19 Vt. 151; *Mitchell v. State*, 12 Ark. 50; *Dietrichs v. Schaw*, 43 Ind. 175. See also *Dehm v. Hinman*, 56 Conn. 320, 15 Atl. 741.

² *R. v. Brown*, Car. & M. (Eng. N. P.) 314; *State v. Deniston*, 6 Blackf. (Ind.) 277.

§ 303. **Unlawful Arrest ordered by Third Party.**

— An unlawful arrest ordered by a third person makes such person liable in damages.¹

TRESPASS AB INITIO

§ 304. **Arises from Abuse of Legal Authority.**

— An officer who in serving civil process, or making a civil arrest, does any act which he has no right to do, or does an act in an unlawful manner which he might be justified in doing if he did it in a lawful manner, becomes thereby a trespasser *ab initio* (from the beginning), that is, every act in connection with the service of the process which was lawful when done, by doing that single unlawful act, becomes thereby unlawful.² But the officer's assistant is not affected by a subsequent abuse of process.³

The entry must be by authority of law, or the officer cannot become a trespasser *ab initio*. The subsequent act, however, will not make the officer a trespasser *ab initio*, unless it shows a purpose to use his legal entry as the cover for the wrongful

¹ *King v. Ward*, 77 Ill. 603; *Taaffe v. Slevin*, 11 Mo. App. 507.

² *Com. v. Tobin*, 108 Mass. 426.

³ *Oystead v. Shed*, 12 Mass. 505; *Wheelock v. Archer*, 26 Vt. 380.

act, or unless the subsequent wrongful act is in itself a trespass.¹

§ 305. **Application of the Doctrine.** — The doctrine of trespass *ab initio* does not apply to criminal cases.² Nor does it apply when the entry is by permission of the party, as where an officer enters, not by authority of law, but by permission of the party, and then wrongfully takes possession of certain papers; there the original entry was not a trespass.³

¹ *Shorland v. Govett*, 5 B. & C. (Eng. K. B.) 485.

² *Com. v. Tabin*, 108 Mass. 426.

³ *Allen v. Crofutt*, 5 Wend. (N. Y.) 506.

CHAPTER XV

FORMS

§ 306. **Criminal Complaint.** — In the following pages are presented a miscellaneous collection of forms pertinent to the use of those interested in the law of arrest. It will be understood that these forms are suggestive only, and that in all cases the provisions of the statutes of the particular jurisdiction must be exactly followed. They may be changed to suit the jurisdiction and parties by inserting appropriate words in the place of those appearing in italics.

CRIMINAL COMPLAINT

(Form 1)

<i>The People of the State of California</i>	{	Complaint for <i>Burglary in the</i> <i>First Degree.</i>
<i>vs.</i>		
<i>John Doe</i>		
<i>State of California,</i>	{	ss.
<i>Sacramento County.</i>		

Before me, *William Blackstone*, a justice of the peace within and for the County of *Sacramento* in the State of *California*, this *first* day of *January*, 1915, personally appeared one *Richard Roe*, who being first duly sworn on oath says that on the *thirtieth* day of *December*, in the

year of our Lord one thousand nine hundred and *fourteen*, at and in the County of *Sacramento* and State of *California*, one *John Doe*, late of *Galt* in said County of *Sacramento* and State of *California* aforesaid, did commit the crime of *burglary in the first degree*, and that said *John Doe*, at the time and at the place last aforesaid committed said crime in the manner following, to wit: the said *John Doe*, at the time and place last aforesaid in the night-time of said day, did then and there feloniously, forcibly and burglariously break and enter the dwelling-house and building of one *James Kent* there situate, with intent to commit grand larceny, and did then and there feloniously and burglariously steal, take and carry away *three diamond rings*, the personal property of the said *James Kent*, and to the value of *five hundred dollars*, contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the people of the State of *California*.

Wherefore complainant, the said *Richard Roe*, prays that a warrant may be issued for the arrest and apprehension of the said *John Doe*, and that he may be dealt with according to the law.

Richard Roe.

Subscribed and sworn to before me this *first* day of *January*, 1915.

William Blackstone,
Justice of the Peace.

(*Annex deposition of informant.*)

CRIMINAL COMPLAINT

(Form 2)

Georgia, Houston county:

Before me, *Wm. S. Moore*, a Justice of the Peace, personally came *Jesse Cooper*, of said county, who

being duly sworn, saith on oath, that on the *fifth* day of *February*, eighteen hundred and *fifty-three*, at *Perry* in said county of *Houston*, *George W. Ray, Jr.*, of said county, did make a violent assault upon the person of *William F. Taylor*, of said county, with a wooden board or piece of plank, which he, the said *George W.*, in his hands then and there, had and held, feloniously, wilfully and maliciously, did strike and inflict divers heavy blows, upon the arm and head of him, the said *William F. Taylor*, giving to the said *William F.* then and there with the board or piece of plank aforesaid, upon his head aforesaid, one or more mortal wounds, of which said striking and blows aforesaid, the said *Wm. F. Taylor* did soon after die.

his
Jesse X Cooper.
mark

Sworn to and subscribed before me, *Feb. 8th, 1853.*
Wm. S. Moore, J.P.

CRIMINAL COMPLAINT

(Form 3)

Commonwealth of Massachusetts,
Suffolk, ss.

To the Justices of the *Municipal Court of Boston* in the County of *Suffolk*, and State of *Massachusetts*, holden in the City of *Boston* for the transaction of criminal business, within and for the County of *Suffolk*.

I, *John Smith*, of *Boston*, in the County of *Suffolk*, on behalf of the *Commonwealth of Massachusetts* on oath complain that *George Plaisted* of *Boston*, in the County of *Suffolk*, on the *fifth* day of *October, 1887*, at *Boston* aforesaid, and within the judicial district of said court, in a public street of said city within said

district, and called *Washington Street*, did then and there perform on a certain musical instrument, to wit, a cornet; he, the said *Plaisted*, not being licensed by the board of police for said city so then and there to do, against the peace of said *Commonwealth* and the form of the statute of said *Commonwealth*, and the rules and regulations of the board of police for said city, in such case made and provided.

John Smith.

Suffolk, ss. Received and sworn to the *sixth* day of *October*, 1887, before said court.

Charles L. Sullivan, Clerk.

The term "complaint" is known in some jurisdictions as "affidavit," and in others "information," therefore the word adopted in the statutes of the particular jurisdiction will be used in the place of "complaint" in forms used in such jurisdictions.

Technical accuracy is not required in preliminary proceedings,¹ and in some States the form need not necessarily conclude with the words "against the peace and dignity of the State,"² or "against the form of statute,"³ but the law

¹ *Brown v. State*, 63 Ala. 97; *Dickson v. State*, 62 Ga. 583; *Reeves v. State*, 116 Ala. 481, 23 So. 28.

² *Thomas v. State*, 107 Ala. 61, 17 So. 941; *State v. Miller*, 24 Conn. 519.

³ *Ex parte Mansfield*, 106 Cal. 400, 39 Pac. 775; *State v. Holmes*, 28 Conn. 231; *Downing v. State*, 66 Ga. 160. *Contra*: *Com. v. Gay*, 5 Pick. (Mass.) 44.

not being uniform on these points, the statutes and decisions of the jurisdiction should be consulted.

Where the certificate of the committing magistrate certifies that it was subscribed and sworn to by the complainant it is immaterial that the complainant's signature was by mark and without the attestation of a subscribing witness.¹

The deposition of a prosecutor or informant must show the facts which show reasonable and probable cause tending to establish the commission of the offense and the guilt of the accused. And if the acts and circumstances supporting the complaint are given, information and belief may support this deposition,² but mere information and belief are insufficient.³

The abbreviation, "J. P." sufficiently designates the official capacity of the issuing magistrate as a Justice of the Peace.⁴

It is not necessary that the complainant's name appear in the body of the complaint;⁵ and

¹ *State v. Depoister*, 21 Nev. 107, 25 Pac. 1000; *Com. v. Sullivan*, 14 Gray (Mass.) 97.

² *Haskins v. Ralston*, 69 Mich. 63, 37 N. W. 45; *Com. v. Phillips*, 16 Pick. (Mass.) 211.

³ *U. S. v. Collins*, 79 Fed. (U. S.) 65.

⁴ *Hawkins v. State*, 136 Ind. 630, 36 N. E. 419.

⁵ *Com. v. Egan*, 103 Mass. 71.

if in the first count of the complaint the complainant is properly described, he may be referred to in subsequent counts as "said complainant."¹

The accused may be described in the complaint as "a person unknown," even though his true name might have been ascertained.²

The letters "A.D." are not necessary where the date of the offense is shown in figures,³ and the use of Arabic numerals in designating the date of the offense is sufficient.⁴ But to state that "on the third day of June instant," without mentioning the year is not sufficient even though the jurat shows that the complaint was received and sworn to on the fourth day of June, A.D. 1855, before said court.⁵

Failure to date the complaint is not fatal when the jurat shows when a complaint was made.⁶ If the complaint alleges that the accused "wilfully did throw a certain missile, to wit, a stone," and the evidence shows a billet of wood was thrown, the variance is fatal.⁷

¹ *Com. v. Clapp*, 16 Gray (Mass.) 237.

² *Com. v. Sherman*, 13 Allen (Mass.) 248.

³ *Com. v. McLoon*, 5 Gray (Mass.) 91.

⁴ *Com. v. Smith*, 153 Mass. 97, 26 N. E. 436.

⁵ *Com. v. Hutton*, 5 Gray (Mass.) 89.

⁶ *Com. v. McIvor*, 117 Mass. 118.

⁷ *Com. v. McCarthy*, 145 Mass. 575, 14 N. E. 643.

§ 307. **Warrants of Arrest.** — If a warrant is necessary to the arrest, the statutory requirements, and provisions of the law not covered by statutes, must be exactly followed.

WARRANT OF ARREST

(Form 1)

Suffolk, ss.

Commonwealth of Massachusetts to the Sheriffs of our several Counties, their Deputies, and the Constables and Police Officers of any City or Town in said Counties, or to either of them, Greeting :

We command you, and each of you, upon sight hereof, to take and bring before the justices of the *Municipal Court of the Roxbury District*, holden in said *Roxbury District*, in the city of *Boston*, for the transaction of criminal business within and for the county of *Suffolk*, the body of *John Doe*, of *Boston* aforesaid, if he be found within your precinct, to answer to the Commonwealth, on complaint of *Richard Roe*, of said *Boston*, this day made on oath before our said court for (*here recite the substance of the accusation in accordance with Mass. R. L. c. 217, sec. 22.*), against the peace of said Commonwealth, and the form of the statute in such case made and provided, and to be further dealt with thereon as to law and justice shall appertain. You are also required to summon *John Jones*, *Samuel Smith* and the complainant, to appear and give evidence touching the matter contained in such complaint, when and where you shall have the said defendant. Hereof fail not, at your peril.

Witness, *Robert A. Perrin*, Esquire, at *Boston*, in said *Roxbury* District, this *first* day of *January*, in the year of our Lord one thousand, nine hundred and *fifteen*.

Edward Chapin, Clerk.

WARRANT OF ARREST

(Form 2)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, TO WIT:

[SEAL] *To any Officer authorized to serve criminal process in said Commonwealth, and to the Officers for attendance upon the Municipal Court of the City of Boston, for the transaction of criminal business:*

GREETING.

We command you, and each of you, upon sight hereof, to take and bring before the *Municipal Court* of the *City of Boston*, holden at said *City of Boston* for the transaction of criminal business, within the County of *Suffolk*, the body of

Joseph Black

of said *City of Boston*,
if he be found within your precinct, to answer to the *Commonwealth* on complaint of *Arthur F. Messer* of said *City of Boston*, this day made on oath before said Court, for

Driving recklessly in street

at said *City of Boston* and within the judicial district of said Court, against the peace of said *Commonwealth* and the form of the statute in such case made and provided.

And WE ALSO COMMAND you, and each of you, in the name of the said *Commonwealth of Massachusetts*, to summon the complainant aforesaid, and

George P. Lindell

to appear forthwith

before the *Municipal Court*, of the *City of Boston* holden at said *City of Boston*, for the transaction of criminal business, within the County of *Suffolk*, to give evidence on behalf of said *Commonwealth* of what they know relative to said complaint.

Hereof fail not, and make return of this precept with your doings thereon.

WITNESS, *Wilfred Bolster*, ESQUIRE, at the *City of Boston* aforesaid, this *nineteenth* day of *October* in the year of our Lord one thousand nine hundred and *fourteen*.

Henry R. Blackmer, ASSISTANT CLERK.

A warrant should show a cause of arrest within the jurisdiction of the issuing magistrate,¹ and should run in the name of the State;² the name of the county in which the warrant is issued should also appear in the warrant.³ It should be directed to a peace officer,⁴ but in case of necessity may be directed to a private person,⁵ but that neces-

¹ *Donahoe v. Shed*, 8 Mete. (Mass.) 326; *State v. Bryson*, 84 N. C. 780.

² *Leach v. State*, 36 Tex. Cr. 248.

³ *Spear v. State*, 120 Ala. 351, 25 So. 46; *State v. Evans*, 88 Wis. 255.

⁴ *Com. v. Moran*, 107 Mass. 239.

⁵ *Kelsey v. Parmalee*, 15 Conn. 461; *Com. v. Foster*, 1 Mass. 488.

sity must be stated in the warrant.¹ And in any event it must be directed to some one.²

Where the warrant is issued by a superior court it may be directed to any peace officer in the State, but if issued by a county court or other inferior court it must be limited to a direction to a peace officer within the jurisdiction of that court,³ or in case of necessity to a private person as above noted.

Some statutes have removed the common law necessity of strict accuracy of descriptions in warrants, and generally provide that merely such description of the offense shall be given that the accused can understand therefrom the charge he is to meet.⁴ Unless required by statute, the time and place of the commission of the offense need not be stated,⁵ and where the complaint containing a description of the offense is attached to or appears in the warrant, the warrant need

¹ See § 60, *supra*.

² *Abbott v. Booth*, 51 Barb. (N. Y.) 546.

³ *Orleans County v. Winchester*, 18 N. Y. S. 668.

⁴ *State v. Weed*, 21 N. H. 262; *Lacey v. Palmer*, 93 Va. 159; 24 S. E. 930; *Rhodes v. King*, 52 Ala. 272; *State v. Tennison*, 39 Kan. 726.

⁵ *Word v. Com.*, 3 Leigh (Va.) 743; *Thorpe v. Wray*, 68 Ga. 367; *Barnett v. Strygler*, *Sneed* (Ky.) 223.

not repeat the description of the offense, but must definitely refer to it.¹

§ 308. **Return of Warrant.**—In the return of a warrant the statutes must be strictly followed,² and unless required by statute no time need be specified for the return.³

RETURN TO WARRANT

(Form 1)

Suffolk, ss.

January 1, 1915.

Then and there, by virtue of the within and foregoing complaint and warrant, I arrested the body of the within-named *John Doe* and read the same in his hearing, and have him here in court before *Nathan Potter, Esq.*, justice of the *Municipal Court* for the *City of Boston*, County of *Suffolk*, and State of *Massachusetts*, for examination.

John Lynch, Sheriff.

(Fees.)

RETURN TO WARRANT

(Form 2)

Suffolk, ss.

January 1, 1915.

Executed the within-named warrant by arresting and bring into court the within-named *John Doe*.

John Lynch, Constable.

¹ *State v. McAllister*, 25 Me. 490; *State v. Sharp*, 125 N. C. 628, 34 S. E. 264; *Com. v. Dean*, 9 Gray (Mass.) 283.

² *Wills v. Whittier*, 45 Me. 544. See also §§ 35, 37, 45, *supra*.

³ *Dickenson v. Brown, Peake* (Eng. N. P.) 234.

RETURN TO WARRANT

(Form 3)

*Suffolk, ss.**Boston, January 1, 1915.*

By virtue of this warrant I have arrested the within-named *John Doe* and now have him before the court for examination. I have also summoned the within-named witnesses to attend court, as within directed.

John Lynch, Police Officer of Boston.

RETURN TO WARRANT

(Form 4)

*Suffolk, ss.**Boston, January 1, 1915.*

I hereby certify that I cannot find the within-named *John Doe* within the *City of Boston*.

John Lynch, Police Officer of Boston.

RETURN TO WARRANT

(Form 5)

*State of Massachusetts,**County of Suffolk, ss.**January 10, 1915.*

I hereby certify that I received the within warrant the *first* day of *January, 1915*, at *twelve* o'clock *M.* and on the same day at *four P. M.* I executed the said warrant by arresting the within-named *John Doe* and hold him in custody by virtue of said warrant; that on the *second* day of *January, 1915*, he entered into a recognizance for his appearance, as required by law, to answer to the charge in said warrant named, which recognizance is herewith returned.

John Lynch,

Sheriff of the County aforesaid.

RETURN TO WARRANT

(Form 6)

*Suffolk, ss.**City of Boston, Oct. 19, 1914.*

I have arrested the within-named Defendant and have *him* in Court, and I have also this day summoned the within-named witnesses, to appear as within directed.

P. E. Holleran,
Court Officer.

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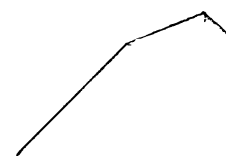
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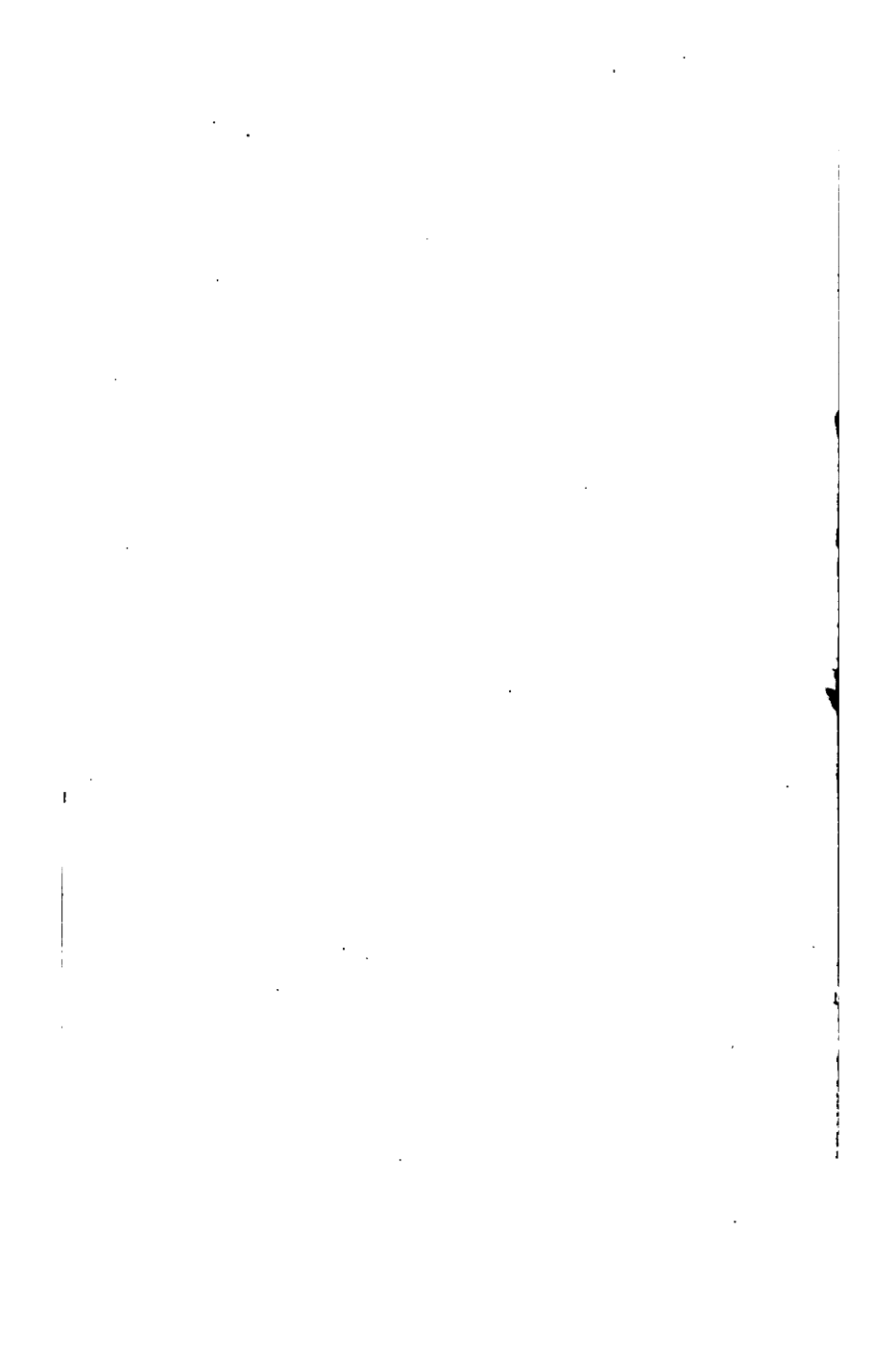
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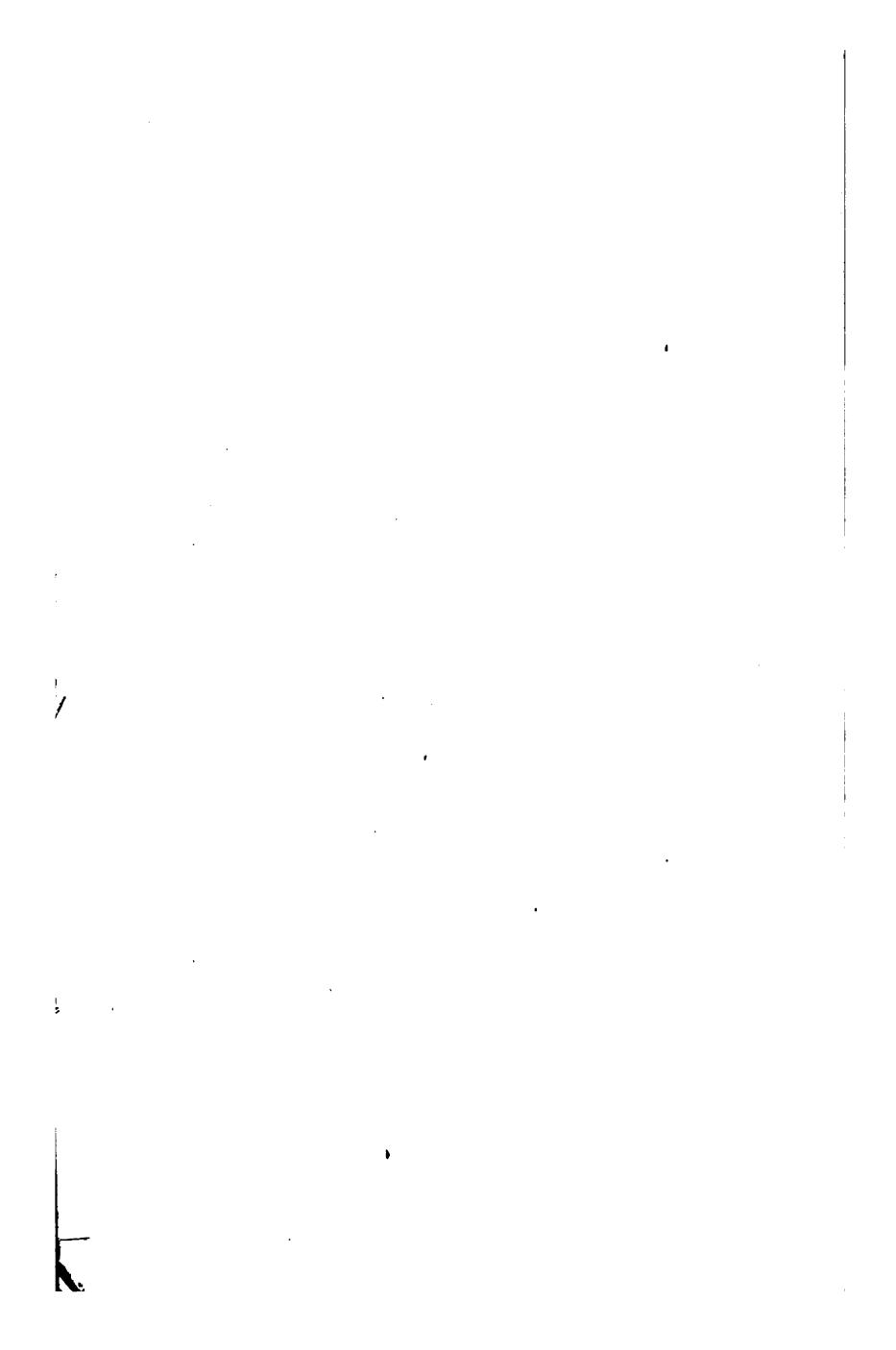
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